Revisiting the Notion of Full Protection and Security of Foreign Direct Investments in Post-Gadhafi Libya: Two Governments, Tribal Violence, Militias, and Plenty More

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Abstract
The escalating violence and deteriorating conditions in today’s Libya have questioned the very likelihood of the survival of foreign investments there. Deemed an oil-producing hub, many oil concessions have been granted to foreign investors in Libya. The challenge that follows is how to legally ensure the full protection and security of investors. This notion is tested in the post-Gadhafi Libya situation in the context of a two-government state, where militias with extremist ideologies in most instances, defy an internationally recognized government and take control over Libyan territories. Such territories contain oil terminals, which leads to a partial or complete disruption of the exploration and exploitation activities. This article attempts to discuss the challenges the notion of full protection and security faces in current day Libya, emphasizing its possible application in a balanced manner. This would mean taking into account both the interests of the investors on the one hand, and the Libyan host state on the other. The question that remains, who represents this host state?

I.
Introduction

An anticipated new progressive Libya, a state that would unite its citizens and move forward towards an inclusive democratic country might be too much of an ambition, at least at the current moment. With the help of the Arab Spring, initiated across the Middle East and North Africa (MENA) region led by Tunisia and followed by Egypt, it was the perfect opportunity for the Libyans to end a forty-year dictatorship rule.
And so they did precisely that. However, with the collapse of the Gadhafi regime, the country entered into a state of chaos, with fragmentation defining the country at its best. What remains? An economic catastrophe in one of its aspects, where the Libyan oil, consistently the main source of income and welfare of the Libyan people, is at risk. As such, the foreign operating countries question what is there to guarantee that their immense losses caused by the ongoing internal conflict are to be restituted and compensated?

This article touches on a crucial element of the very survival of foreign investments in today’s Libya, precisely oil concessions, which is their full protection and security. Now, with that being said, there have been previous situations where the investors in investor-state relationships have engaged in activities within hostile environments. Nonetheless, the Libyan situation poses somewhat different challenges.

Post-Gadhafi Libya has been fragmented and ruled by multiple militias, even exemplified by a two-government state, as shall be explained later on. Widespread and intensified violence has also been the theme in this post-conflict period, or actually ongoing conflict. Oil terminals are directly targeted with violent acts for different reasons, which the anticipated state institutions, de facto sterile, cannot control.

This article, thus, tries to identify how the notion of full protection and security could support claims by foreign investors in situations like this. Although there are different functioning governments and militias, nevertheless, there are doctrines that would protect this notion in the form of the law of the occupant, in addition to well-defined Bilateral Investment Agreements (BITs), which nonetheless tease the question of which government would bear responsibility. Hence, the second chapter explains the
current situation in Libya after the collapse of the Gadhafi regime. Following that, the third chapter displays how the notion of full protection and security has functioned within the previous legal doctrines and jurisprudence. Lastly, the fourth chapter applies the different legal doctrines to the post-Gadhafi period, discussing the Articles on the Responsibility of the State for Internationally Wrongful Acts, and the exceptions that may be pleaded, including force majeure and necessity in relation to the laws on jus in bello. And finally, where political risk insurance could also play a role in safeguarding these investments.

II.

A Current State of Chaos in Libya

The ongoing Libyan internal tensions, or rather conflict, following the 2011 revolution, specifically connected to the oil concessions granted to the different oil companies in Libya, seems to be at its peek. The subject matter of these concessions is the exploration and exploitation of pre-dominantly hydrocarbons, in which Libya is one of its major exporters. The Libyan National Oil Corporation (NOC) lists: the Eni North African Company, Amerada Hess Company, India oil Company, Total E&P Company, Petro Canada Company, Polish Oil & Gas Company, OMV Company, OXY Company, BP Exploration Libya Limited Company, STATOIL Company, Gazprom Company, Repsol Murzuq Company, Petrobras Company, Chevron Libya LTD Company, Shell Company, RWE Company, Sonatrach Company, Turkish Petroleum Corporation, Medco Energy Company, Exxon Mobil Company, ONGC Limited Company, Tatneft Company, and
Wintershall AG Company as foreign operating companies in Libya, in addition to the national corporations.¹

These companies operate throughout Libya where the oil terminals or fields are located. This includes the largest oil ports in the country, mainly in the eastern part, consisting of: the Es Sider (Sidra), Ras Lanuf, Zueitina, and Marsa al-Hariga, where 80% of Libya’s oil reserves are located. And in the Western area, there are the El Sharara and El Feel (Elephant) fields.² Libya maintains Africa’s largest crude oil reserves, and amongst the top ten in the world.³

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³ Id. at 3.
With that being said, the country’s challenge that appeared with the overthrow of the Gadhafi regime is its escalated fragmentation. To put it in other words, state governance is portrayed in two competing governments. One is supposedly internationally recognized to a certain extent in the eastern Libya city Tobruk represented by the General National Council (GNC) –known as the house of representatives- led by current Prime Minister Abdullah Al-Thanni that fled the capital Tripoli. And the other is a “de facto” government controlling the capital city from the west, composed primarily of Islamist militias from the city of Misrata linked to extremist groups known as the “Dawn
Forces”-connected to detached previous member of government General Khalifa Hafter.

The point here is that the deteriorated recognized government and its incapability to carry out its functions led to tribal battles over land, presumably through interrupting oil exploration and shipments that have led to devastating economic costs to the state. It was estimated that Libya ended up producing only 330,000 barrels a day after it produced 1.6 million a day just after the 2011 revolution, according to the head of the Libyan NOC, Mustafa Sanala, as of January 2015.

Now, when discussing these different clashes in the different territories, the interesting thing is that it isn’t solely Islamist extremists’ thwart of power. Rather, embedded within there are tribal and rather also indigenous peoples’ efforts to prove existence, and more importantly possession, or let’s say at least, connection to land.

Clashes including the Tuareg and Tebu tribes, indigenous in Libya’s southern desert were one pure example of such. While the Tuareg tribe was perceived to be pro-Gadhafi, the Tebu supported the rebels against Gadhafi. Consequently, acts of retaliation were committed against the Tuaregs of Libya, especially with instances like the battle in the town of Ubari, leading in most instances to their internal enforced displacement. In a letter from Human Rights Watch to the Misrata Local Council, the former announced it was worried about the Misraten thwar (rebels) attacks on the Twargha (Tuareg

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7 Id.
community) as being of widespread and systematic nature, raising the issue of crimes against humanity committed against them. They were driven away from the lands they claimed to occupy in Libya’s southwest Saharan desert area embracing the *El Sharara* oil fields and escaping to neighboring countries like Tunisia or even Mali. And as a result too, militias control the security and access to the oil fields there and many other areas.

The *El Sharara* oil field, like many other oil fields in Libya, has witnessed shutdowns by the operating companies like the Spanish giant Repsol SA, because of the tense security conditions and threats from these local communities. One main justification of such retaliatory acts is lack of just distribution of the oil revenues in these territories, not to mention the lack of representation in governmental positions as broader constitutional demands.

On both the armed forces and police forces level, the conditions didn’t at all seem reassuring. While the armed forces were estimated at about 76,000 personnel, they were actually only 20,000 with outdated arsenal and lack of expertise. What they were predominantly trained to achieve was to protect the previous Gadhafi regime from any uprisings, and so consequently, the military positions were filled based on tribal affiliations and loyalty to the regime rather than qualification. As for the police force, known as the People’s Security Force, it was estimated at about 45,000 personnel, but turned out to be way less than this. Like the armed forces, they also lack expertise, up-to-

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9 Id.


date weaponry, and are tainted with the ideology of regime-oriented protection.\textsuperscript{12} It is simply logical that a new regime would use these same weaknesses –or what it would perceive as strengths- to stay in power. But then again the actual security and protection of state facilities themselves, and more importantly for the sake of this article, the foreign investments would be in danger.

The Gadhafi period has been rough on certain minorities like the Amazigh movement, know as the Berbers of Libya’s Saharan Desert area, including the tribes previously mentioned, the Tebu and Tuareg, with his Arabization policy. The movement though saw hope to assert its claims when the state is living a “fractured”, “fragmented”, and \textit{de facto} “decentralized” phase. While the Gadhafi period may have been a rough centralized “one man’s show” state, the two governments are busy defying each other, and the foreign investor corporations are lost in the midst of a threat to their survival that includes their safety and economic stability.

While extreme violence and dangerous tensions persist, and one internationally recognized but nevertheless weak government is present, the extractive industry in Libya doesn’t seem that attractive to corporations. The primary issue is ensuring their safety within this hostile environment. And safety in this context would refer to the physical safety of their personnel and facilities, in addition to that of the oil shipments and their use generally. The corporations may simply just decide to divest in such circumstances. But should they? Perhaps other solutions are possible alternatives.

Needless to say, not all Libyan’s would like to resort to violence. However, governing militias, albeit prepared to provide security and protection to oil investments,

\textsuperscript{12} \textit{Id.} at 104-05.
would have equal attention as the GNC and other sectors of the local community. This factual ground further poses the challenges this study sets to discuss.

III.

The Evolution of Full Protection and Security in Investor-State Arbitration

The notion of full protection and security has been gradually increasing as field of discussion within the investor-state arbitration realm, beginning to mitigate the “exclusive” relevant importance the notion of fair and equitable treatment used to monopolize in some sense. Its importance, however, may have intensified with current escalated global violence, such as that posed by the Arab Spring, including Tunisia, Egypt, and Libya. Brief insight into the evolution of this notion and its comparative approach is useful in as much as it can guide the Libyan situation.

A. Legal Doctrines on Full Protection and Security

Both Bilateral and multilateral investment treaties have codified the notion of full protection and security in their provisions, to ensure a further concise aspect of protection is provided for both investors, to better operate in the host state, and the host state itself, in order to guarantee that outer boundaries of what it bears the burden of providing are clear, and most importantly reasonable with some regulated form of discretion in line with its capabilities.

To start off, the Energy Charter Treaty of 1994 outlined this notion in Article 10(1), in a way that is within the context of fair and equitable treatment, by providing:

Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.

The notion was identified within the phrase “constant protection and security”. As for the North American Free Trade Agreement (NAFTA), it had undergone an evolutionary stage where it began with broad language leaving it to the Agreement’s parties to elaborate it. Ultimately, there was an interpretive statement in 2001 by the NAFTA Free Trade Commission, which confined its boundaries to the minimum standard of treatment given to aliens in customary international law.14

As a result, both the U.S and Canadian model BITs implemented this minimum standard approach and no more than that. The U.S. Model BIT -2004 and the current

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14 *Id.* at 2. The 1992 NAFTA broad provision in art. 1105(1) expressed that the parties “shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”
2012 version— in Article 5(2/b) clarifies that this standard would refer to requiring a state party to provide “the level of police protection required under customary international law.”

The Association of Southeast East Asian Nations (ASEAN) Investment Agreement of 2009 stresses that full protection and security would oblige states to take measures in a “reasonable way”, hence no strict liability is acknowledged. In comparison, other regional investment treaties such as the Southern African Development Community Finance and Investment Protocol of 2006 and the Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area of 2007 omit this notion from their provisions.

B. Relevant Jurisprudence

International arbitral tribunals have assessed the previous legal doctrines and applied them to cases where this notion was raised. With regards to the standard of liability on the state, full protection and security does not generally impose absolute strict liability, rather it stems from the requirement to take “reasonable” measures, which would better be identified in the context of “due-diligence.” The *Elettronica Sicula SpA (ELSI) (United States v. Italy)* case by the International Court of Justice (ICJ) enforced such a standard.

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15 *Id.* at 3.
16 *Id.* at 4.
The Asian Agricultural Products Ltd (AAPL) v. Sri Lanka of 1990 case also declared such a standard by explaining:

The Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State or its agents, and to establish the State's responsibility for not acting with “due diligence”.¹⁹

The AAPL v. Sri Lanka case concerned escalated violence during the Tamil insurrection between the Sri Lankan forces and insurgents that lead to the death of 20 of AAPL’s employees and destruction of the shrimp farm. The Tribunal, nevertheless, could not establish whether the rebels or the Sri Lankan security forces were directly responsible for such damages, yet the state was obliged to diligently prevent them.²⁰ The Wena Hotels v. Egypt Tribunal reiterated this same standard, where two of the investor’s hotels were forcibly seized and the Egyptian government did not take the appropriate measures to prevent such events that were committed by two employees of a state agency (EHC), although not attributed to the state, using sticks.²¹ The Tribunal explained:

The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena's investment "fair and equitable treatment" and "full protection and security." Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware

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¹⁹ AAPL v. Sri Lanka, Award, 21 June 1990, 4 ICSID Reports 246, ¶53.
²⁰ Malik, supra note 13, at 5.
²¹ Wena Hotels v. Egypt, Award, 8 December 2000, 41 ILM 896 (2002), ¶84.
of EHC's intentions to seize the hotels and took no actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.\textsuperscript{22}

In \textit{Tecmed v. Mexico} and \textit{Noble Ventures v. Romania}, both tribunals decided that the Mexican and Romanian governments weren’t held responsible for demonstrations and protests by non-state actors, as there was no sufficient evidence to the contrary.\textsuperscript{23} The previous does confirm the host-state’s positive obligation in such circumstances where even non-state actors may have been involved in threatening the security of the investment. State actors or organs could also be involved in the breach of this notion, such as in the cases of \textit{Biwater Gauff v. Tanzania} and \textit{AMT v. Zaire}.\textsuperscript{24}

These cases do mainly discuss the threat and actual damage posed by physical violence as opposed to the more controversial and recently debated theme of whether legal security too would fall under the auspices of of full protection and security.\textsuperscript{25} Nonetheless, this article focuses on physical security, as it is the issue in current day Libya.

\textsuperscript{22} \textit{Id.}
\textsuperscript{23} Malik, \textit{supra} note 13, at 6.
\textsuperscript{24} Schreuer, \textit{supra} note 17, at 4-5. It is also worth noting that the tribunal in the case of \textit{LESI et al v. Algeria}, ICSID Award 2008, considered the prevailing circumstances in Algeria, being the risky and isolated region of Wilaya do Bouira where the site is located, when the Algerian authorities exerted their security efforts in the midst of the clash with certain terrorist organizations, in relation to the notion of fair and equitable treatment. \textit{LESI et al v. Algeria}, (Award) (2008) ICSID Case No ARB/05/3 ¶¶115-117, 165-180.
\textsuperscript{25} Schreuer, \textit{supra} note 17, at 7-8.
IV.

Interplay of Legal Doctrines Endeavor to Achieve Full Protection and Security in Libya

This factual, doctrinal, and jurisprudential background was displayed in a manner that attempted to explain how previous efforts may have to be elaborately examined when such circumstances such as the present day Libyan one emerge. Consequently, the Post-Gadhafi period would be assessed in light of different approaches, in as much as each would support claims for better ensuring full protection and security is not lost in translation, because of a complex situation. This would also espouse future similar situations in a tense and unfortunately violent world.

A. The ILC Articles on State Responsibility

The U.N. International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles) of 2001 are of extreme relevance to the Libyan situation. In knowing who bears the responsibility of providing full security and protection and for what, a breach could also be attributed. The ILC Articles embody certain provisions that should be exhibited.

Notwithstanding the substance of the breach being “internationally” wrongful acts, the burden of such responsibility starts with the state organs clearly, in whichever
capacity, legislative, judicial, or enforcement. And whether the organ possesses central government status or provincial.\textsuperscript{26}

The other relevant article concerns the situation in which a person or group exercises elements of governmental authorities when official authorities are in the default or absent.\textsuperscript{27} This may be the case when state witnesses a collapse of institutions or incapacity to reach certain areas of the country that may be deemed hostile because of the control of a certain rebel group(s), i.e. present day Libya.

Lastly, Article 11 of the ILC Articles speaks in many ways, to a certain extent at least, the current Libyan playfield. This Article discusses the conduct of an insurrectional or similar movement and stipulates:

1. The conduct of an insurrectional movement, which becomes the new Government of a State shall be considered an act of that State under international law.

2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law.

3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9.

\textsuperscript{26} Art. 4 of the ILC Articles. Art. 5-8 could be considered connected mainly to the idea of art. 4.

\textsuperscript{27} Art. 9 of the ILC Articles.
This Article, in its three sub-paragraphs, would clearly anticipate a new rebel revolutionary movement, which aims and later succeeds in replacing the ruling government. The GNC did precisely that in connection with the Gadhafi regime in 2011, and was consequently internationally recognized for its new governmental role, back when it started off as the National Transitional Council (NTC) and later transformed into the GNC.²⁸

Now, what changes these clear facts is a current overlapping governmental role, in which another insurgency, de facto claimed control over certain territories, most importantly the capital city Tripoli. So, the conduct of a successful militia insurrectional movement along with the acts of the previous Gadhafi government, are attributed to the State. The question remains, which government is responsible if claimants were to invoke full protection and security?

Rules on state governance are aligned with discussions regarding the formation of a state itself in some ways. The criteria of a state, embodied in the Montevideo Convention on the Rights and Duties of States of 1933, sets a list of still controversial criteria to be met through: 1) a permanent population; 2) a defined territory; 3) government; and 4) capacity to enter into relations with the other states.²⁹ As is for states, governments as well would have to have effective control or authority over a territory. In addition, there is the controversial international recognition element, whether it would be

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²⁸ The U.N. Security Council in Res. 2009 (2011) did “implicitly” recognize the NTC as the legitimate representative of the state albeit this didn’t actually come up until the armed conflict with the Gadhafi regime ended with the victory of the NTC affiliates. Daniella Dam-de Jong, Armed Opposition Groups and the Rights to Exercise Control over Public Natural Resources: A Legal Analysis of the Cases of Libya and Syria, 62 NETHERLANDS INT’L L. REV. 1, 13 (2015).
seen as a “constitutive” or “declaratory” act, with some polarization towards the latter. Recognition is often declaratory of the facts discussing the emergence of the state, and constitutive in so far as rights and duties are generated for the new state in relation with the recognizing one. As such, although the Tobruk based government is internationally recognized and, in some parts of the state, effectively controls those areas, the Tripoli based predominantly militia government, also exerts effective control over territories of the country but lacks international recognition, as of the time this article was written at least.

The GNC would be closer than the other de facto government, at least at this very moment, which is susceptible to further political changes, to bear the responsibility of fully protecting and securing the investments in the state. It is nevertheless debated that in the international law realm, albeit not as firm as suggested, a pre-mature recognition of an opposition group as the new government is prohibited in order to prevent a hesitant stance by other states in which they would change their policy whenever it suits their interests. As such, the established authorities would remain legitimately the representative of the state as long as the armed conflict persists and remains undecided, provided legal title exists, which is generally assumed for newly established authorities. State recognition is really a political statement after all. The de jure government remains authorized to administer the state, including oil as its natural resource, reserved for state governance, “fairly”.

30 ANDREW CLAPHAM, BRIERLY’S LAW OF NATIONS 150-51 (7th Ed. 2012.).
31 Id. at 153.
32 Dam-de Jong, supra note 28, at 7.
33 Id. at 7-10.
34 Id. at 8.
Some have called for resorting to the concept of *usufruct*, or the law of the occupant, in order to justify a current government’s position—even where its main components are armed groups—administering its natural resources in the territories it has effective control over. This administration should qualify as “civilian” administration,\(^{35}\) which the state, and the foreign investments need in the midst of an internal armed conflict. What this recourse would still have to face and with its own words being employed resorting to Article 1 of the 1907 Hague Relations,\(^{36}\) is that the requirement of maintaining effective control comprising measures taken to “to restore, and ensure, as far as possible, public order and safety…” is in itself arguable. The previous facts on the Libyan situation question this ability.

It is worth considering too whether the international community’s pre-judgment with non-recognition when it maintains affiliation with extremist movements like Al Qaeda and ISIL and others, applies to this *de facto* insurgency movement. The U.N. Security Council Resolutions, lastly Resolution 2170 (2014) prohibited any support, commercial interaction, and recognition of such terrorist based groups.\(^{37}\)

The main fact remains; legal rights and duties remain effective even with a change in government, where an insurrectional movement seizes power. The *Tinoco*

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\(^{35}\) *Id.* at 19-20.

\(^{36}\) This article states that the occupant “shall take all the measure in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” *Id.* at 19.

Concessions case in 1923 affirmed the principle of continuity when an internal policy or government is changed, which does not affect its status under international law. The new government after a coup d’État in Costa Rica issued what was called the Law of Nullities, nullifying all contracts entered into by the previous Tinoco regime.\textsuperscript{38} The post-Gadhafi NTC government has actually pledged to uphold the previously negotiated oil concessions and contracts generally, not withholding its right to investigate allegations of corruption related to these negotiations.\textsuperscript{39}

B. BITs Well Drafted?

While the ILC Articles could set the Libyan framework as a state’s responsibility for “internationally” wrongful acts, it is for the BITs to include and specify what the wrongful acts would pertain to, a form of lex specialis perhaps. When briefly identifying the BITs concluded by Libya, there have been provisions that support claims to assure the full protection and security of the investor as opposed to the host state.\textsuperscript{40}

Libya is party to 19 BITs that are in force to this date with Austria, Belarus, Belgium-Luxemburg, Bulgaria, Egypt, Cyprus, Ethiopia, France, Germany, Italy, Malta, 

\textsuperscript{38} Aguilar-Amory and Royal Bank of Canada Claims (Tinoco Case) (Great Britain v Costa Rica), (1923) 1 RIAA 369, 377.

\textsuperscript{39} War Damages to Hit Return of Libyan Crude, FINANCIAL TIMES, June 9, 2011, available at http://www.ft.com/intl/cms/s/0/c382946a-d7b5-11e0-a06b-00144feabdc0.html#axzz225zCCjaH

\textsuperscript{40} One interesting piece of information is that the new Libyan Draft Constitution contained a chapter on “Transitional Justice Measures”. And in one of its provisions addressing the right to compensation, the state commits itself to compensating victims and affected parties, individuals, groups, or regions in proportion to the harm or damage done, which applies to military operations and armed conflicts. Further, it commits itself to:

2. Guaranteeing the rights of persons whose property or movable assets have been illegally taken away. In the case of property, the elements that should be taken into account are the rights of the original owner, the financial position of the person who has illegally taken the property, the constructions added to the property and the previous administrative and judicial procedures;

Morocco, Portugal, Russia, Serbia, Singapore, Spain, Switzerland, and Syria, the last being with Singapore. Whereas it has also signed another 19 with China, Congo, Croatia, Gambia, India, Indonesia, Iran, Kenya, Korea, Qatar, San Marino, Slovakia, South Africa, Tunisia, Turkey, and the Ukraine, but they are not in force yet.41

The Croatia-Libya BIT for example, in Article 2, provides such a specific clause containing:

3. Investments made by investors of either Contracting Party shall enjoy full legal protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments of investors of the other Contracting party in its territory.42

The Libya-Portugal BIT also presses for non-discriminatory treatment within the meaning of national treatment and most-favored nation treatment in cases of civil strife and armed conflict. Article 7 of this BIT stipulates:

Each Party shall provide to investors of the other Party, whose investments suffer losses in the territory of the first Party owing to war or armed conflict, revolution, a state of national emergency, disobedience or disturbances or any other event considered as such, treatment that restitutes the conditions of these investments that existed before the

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damage had occurred, or compensation, or any other settlement that is no less favourable than that Party accords to the investments of its own investors, or of any third State, whichever is more favourable. Any payment made under this article shall be, without delay, freely transferable in convertible currency.43

Likewise, the Austria-Libya BIT includes a similar provision, albeit applies mainly to government forces or authorities rather than non-state actors such as militias. Article 5 embodies this clause:

(1) An investor of a Contracting Party who has suffered a loss relating to its investment in the territory of the other Contracting Party due to war or to other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event, or acts of God or force majeure, in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third state, whichever is most favourable to the investor.

(2) An investor of a Contracting Party who in any of the events referred to in paragraph (1) suffers loss resulting from:

(a) requisitioning of its investment or part thereof by the forces or authorities of the other Contracting Party, or

43 Schreuer, supra note 17, at 10.
(b) destruction of its investment or part thereof by the forces or authorities of the other Contracting Party, which was not required by the necessity of the situation, shall in any case be accorded by the latter Contracting Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Article 4 (2) and (3).

C. Any Exceptions that Libya can invoke?

While the notion of full protection and security may have been well protected and finds its support in legal doctrines such as Libya’s BITs, jurisprudence, and the ILC Articles. One point remains, can Libya, as a host state, invoke any exceptions in order to circumvent what full protection and security implies and requires of the state? The chaos in Libya certainly seems to have gotten out of hand, where (a) government would find itself at least incapacitated when it comes to abiding by its contractual and treaty obligations.

In this regard, it would be necessary to discuss the reasons that may be raised as exceptions to providing full protection and security by the state to the investors. These exceptions would be: special BIT clauses on the one hand, and both necessity and force majeure as general reasons on the other.

1. BIT Clauses

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44 Id. at 11-12.
As a Segway to the more controversial grounds for exceptions from the duty to provide full protection and security, there are specific provisions within a BIT that strictly identify circumstances where the host state would no longer be burdened by this obligation. Such clauses would balance the risk between a somewhat weak and worried investor as opposed to a strong but resource limited state.45

One example of such a clause, and without further elaboration, would be the Belgium-Libya BIT, which in Article 3 stipulates:

2. Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof.46

2. Force Majeure

In the chapter on Circumstances Precluding Wrongfulness, the ILC Articles include force majeure as one of such reasons, and states:

1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or of an unforeseen

45 So-called “national security” clauses aren’t at all unique to the world of BITs. Art. XI for instance of the U.S.-Argentina BIT addresses this meaning: “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.” Similar provisions are found in NAFTA art. 2102, the 2004 U.S. Model BIT, and the Energy Charter Treaty in art. 24(3). Schreuer, supra note 17, at 14-16.
46 Karzi, supra note 42, at 34.
event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if:

(a) the situation of force majeure is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring.\(^{47}\)

This provision identifies \textit{force majeure} as being “the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.” This defense could be seen as a general principle of international law.\(^{48}\)

The “two-government” state in Libya, while the GNC is the likely representative of the state as previously discussed, would mean that the loss of territorial control to belligerent movements, would mean that the state in these circumstances could perhaps claim a defense of \textit{force majeure}.\(^{49}\)

In \textit{Toto Costruzioni v. Lebanon}, the Tribunal noted the fact that the long delay in court proceedings due to the ongoing terrorist attacks, a war with Israel, and internal battles, would lead the Tribunal not being able to exercise its jurisdiction over the claims.\(^{50}\)

\(^{47}\) Art. 23 of the ILC Articles


\(^{49}\) Id. at 40.

\(^{50}\) \textit{Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon}, Decision on Jurisdiction, ICSID Case No. ARB/07/12, Sep. 11, 2009, ¶¶165-68.
*Force majeure* is not an absolute unrestricted defense though. The *Autopista v. Venezuela* Tribunal defined three requirements for a successful claim on this ground. This included 1) impossibility, where the performance was made impossible to achieve, 2) unforeseeability, and 3) non-attributability, where the events were not attributable to the defeating party.51 This pertained to the events in Venezuela that involved riots and civil unrest to proposed toll increases. The Tribunal decided to reject Venezuela’s claim of the existence of *force majeure*, because the strong public resistance was not apparent at the time the Concession Agreement was signed.52

Nevertheless, the Libyan situation does tend to frequently change and usually to a more intense situation, which eventually would make this defense more plausible to a certain degree. But what would be more controversial perhaps is debating whether the GNC would have been in a situation where the hostile events are actually forseeable and a nexus could be drawn as to attribute the incidents to its conduct. The GNC could be perceived to have insisted on a non-inclusive government and unfair and inequitable distribution of its natural resources, i.e. oil revenues, throughout the ongoing new constitution-drafting period.

3. Necessity

The other exception to the full protection and security obligation was also embodied in the ILC Articles, which is necessity. And this defense would only be successful if the act:

52 *Id.* at ¶¶116-19.
“(a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and

(b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.”\textsuperscript{53}

Such grounds would be precluded as in \textit{force majeure} when the state contributes to the situation of necessity.\textsuperscript{54}

The current situation in Libya would have to be assessed in terms of it being an armed conflict first in order to acknowledge the application of the necessity rule, or not. The conflict in Libya during the 2011 revolution with the existence of the Gadhafi regime has started off as being a non-international armed conflict, then, with the international intervention, through the North Atlantic Treaty Organization (NATO), authorized by U.N. Security Council Resolution 1973 (2011), it became an international armed conflict.\textsuperscript{55}

In this respect, \textit{jus in bello}, international humanitarian law (IHL) rules kick in. Amongst the most important requirement for an acceptable hostile attack is that the attack be 1) necessary, and 2) proportionate, “in relation to the concrete and direct military advantage anticipated.”\textsuperscript{56} Property is also protected in IHL, which refers to “military objectives”. This protection would include:

\begin{footnotesize}
\begin{enumerate}
\item Art. 25/1 of the ILC Articles.
\item Art. 25/2(b) of the ILC Articles.
\end{enumerate}
\end{footnotesize}
1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.\(^\text{57}\)

The Libyan scenario, at least in relation to precisely what this article aims to achieve by examining the notion of full protection and security in connection to oil concessions granted to foreign investors, would not seem to be a permissible military object. Rather, oil terminals in Libya and their facilities would be at odds with necessitating a direct anticipated military advantage. The defense of necessity wouldn’t be the best ground for the host-state government to invoke, especially since it would not in itself take responsibility for non-state actors’ hostile acts, and even if the latter succeed with governmental status the result would remain the same.

**D. Political Risk Insurance to Supplement the Situation**

An additional factor is worth looking into when balancing the risks investors face in such hostile environments like Libya and the gains they anticipate. A major source of

\(^{57}\) Art. 52 (1 & 2), Additional Protocol I.
coverage and guarantee for such environments is the Multilateral Investment Guarantee Agency (MIGA).

MIGA is a member of the World Bank Group, and it engages in insuring investors in high-risk situations, as one of its main activities. It lists war, terrorism, and civil disturbances, as one of the types of coverage it undertakes. What may be useful to look into, as a viable solution for investors in relation to this article, is the conditions in which investments are covered in situations of war, terrorism, or civil disturbances.

One important thing to point out at the outset is that MIGA acknowledges, in its Operational Policies, that coverage would even apply against the host state government when it is a de facto government over the territory where the investment is located, and whether the host government takes or omits to take action.

The military action or armed conflict, which would be covered against, would include “hostilities between armed forces of governments of different countries or, in the case of civil war, between armed forces of rival governments in the same country, including both declared and undeclared wars.”

As for civil disturbances, there is some broad coverage basis that would comply with components of the notion of full protection and security as the previously mentioned BITs addressed. The Operational Policies in terms of civil disturbances, indicate:

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59 MIGA, *Operational Policies*, 2015, ¶¶1.35-1.36, available at [http://r.search.yahoo.com/_ylt=A0LEVvv6X05Vg0A92YnnIIQ_;_ylu=X3oDMTByOHZyb21tBGNvbG8DYmYxBHJXZvMxBHJ0aWQDBHNIYwNzcg--?RV=2&RE=1431228538&RO=10&RU=http%3a%2f%2fwww.miga.org%2fdocuments%2fOperational-Policies.pdf&RK=0&RS=D64gfGGZ4qBSHScTUzojakfGcE-](http://r.search.yahoo.com/_ylt=A0LEVvv6X05Vg0A92YnnIIQ_;_ylu=X3oDMTByOHZyb21tBGNvbG8DYmYxBHJXZvMxBHJ0aWQDBHNIYwNzcg--?RV=2&RE=1431228538&RO=10&RU=http%3a%2f%2fwww.miga.org%2fdocuments%2fOperational-Policies.pdf&RK=0&RS=D64gfGGZ4qBSHScTUzojakfGcE-) (last visited May 8, 2015).
60 *Id.*
61 *Id.* at ¶1.47.
1.48 Coverage against civil disturbance shall include organized violence directed against the government of the Host Country that has as its objective the overthrow of such government or its ouster from a specific region, including revolutions, rebellions, insurrections and coups d’état.

1.49 (a) Coverage may also be provided against civil disturbance, which takes the form of:

(i) riot: an assemblage of individuals who commit public acts of violence in defiance of lawful authority;

(ii) civil commotion: events which have all the characteristics of a riot but which are more widespread and of longer duration without, however, attaining the status of civil war, revolution, rebellion or insurrection; or

(iii) terrorism: events of terrorism and sabotage.

(b) The violent acts or events referred to in this paragraph may be directed at the Host Government, at a foreign government or foreign investment, including the government of the investor’s country or the nationality of the investor.

1.50 In all cases, the civil disturbance must have been caused or carried out by groups primarily pursuing broad political or ideological objectives. Acts undertaken to further labor, student or other specific interests and acts of kidnapping or similar acts directed against the Guarantee Holder shall not qualify for coverage as civil disturbance, but, if politically motivated, may be covered if the Board so decides under Paragraph 1.24(c) above.
The Operational Policies concerning civil disturbances insist there be some sort of “intent” of the groups involved in such disturbances, where they’d have to be aimed at pursuing “broad political or ideological objectives.” Generally, it would have to fall under the category of “political motivation”. This wouldn’t be difficult to establish in post-Gadhafi Libya, where certain militia groups supporting the Libyan Dawn pursue ideologies in connection to terrorist groups such as ISIL, in order to “wipe out” what are perceived as Muslim territories from “Western imperialism”. And as such, foreign investors would, in some sense, -fallaciously- serve imperialistic purposes that are aligned with the countries they are seen to be at least predominantly incorporated in.

What is interesting too is the phrase “Coverage may be extended to losses due to business interruption, including operating costs and lost net income.” In situations where the rebel or militia groups prevent the shipment of oil and its transportation, or obstruct the exploration or exploitation operations that lead to economic losses, which have certainly been drastic as mentioned before, the coverage would be beneficial, but then again so widespread that would threaten its continuation probably.

So, what does this tell us about Libya? MIGA’s World Investment and Political Risk Report 2013 clearly identifies the MENA region as one active area in which civil disturbance, armed conflict, and terrorism are viable coverage reasons, precisely at the current stage after witnessing political turmoil as a result of the Arab Spring.

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62 Id. at ¶1.52.
amount of $179 million. And Libya itself in 2012 monopolized 22% of such claims, to what is equivalent to $27 million.

This discussion should not imply in any way that the relationship between the foreign investors and the Libyan state are by far only insurance policies guaranteed by other agencies when it comes to full protection and security. This political risk insurance debate would, in such tough times when legal discussions about the extent of full protection and security hit their peak, provide a viable solution for these foreign investors.

V.

Conclusion

This article has attempted to touch on the notion of full protection and security when it is most needed. The deteriorating situation in Post-Gadhafi Libya proves that this notion will have to go through a tough test. The condition that prevails is a two-government state, where militias actually pre-dominate both, and one is internationally recognized, but nevertheless is in a precisely institutionally collapsed state.

The evolution of full protection and security has undergone some relatively recent discussions. Legal doctrines and jurisprudence has, albeit minimally perhaps, been engaged in assessing the implementation of this notion in different contexts within different regions of the world. The still to come stable general standards and understanding of full protection and security may have been substituted with clear BIT

64 Id. at 36
65 Id.
provisions, and this is certainly a well-approached solution to ensure the autonomy of the parties when it comes to unstable conditions.

After acknowledging that full protection and security is not an absolute notion, and that it falls under certain exceptions including special BIT provisions, *force majeure*, or necessity, an important point to stress would be that a balance between both the foreign investors’ interests and the host state Libya’s is critical. As in the *LESI v. Algeria* case,⁶⁶ the regional context where the investments were located should be taken into account when putting full protection and security to the test of reasonableness and due diligence that Libya would have a duty to undertake. The complete loss of control over certain Libyan territories by the GNC to extremist militias who refuse what they see as foreign imperialism in holy Muslim territories, even if that was at the expense of an economic collapse, is certainly a factor the GNC would have to grapple with in order to abide by its contractual and treaty obligations. These circumstances perhaps should be regarded.

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⁶⁶ Mentioned in *supra* note 24.