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INVESTMENT PROTECTION IN ARMED CONFLICT

AN ANALYSIS OF LIBYA AND SYRIA

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1. Introduction

Investment protection in armed conflict constitutes a valuable segment of international law and international arbitration. The current international economic environment allows corporations to invest and build commercial relationships with a variety of States, not just their own. As a result, foreign investment has taken flight, and with it, the accompanying risks of investing on a commercially global scale. Existing in tandem with this relatively open economic climate has been a surge in new international and non-international conflicts, particularly within the Middle East, North and Sahel Africa, and Central Europe. The world of foreign investment has often not avoided these conflicts, and in many cases has suffered because of it.

Fortunately, alongside the development of foreign investment as a *de rigueur* of today's economy has been the gradual construction of the laws of international investment protection. Constituted by conventions, jurisprudence and custom, international investment protection law has provided foreign investors with rights and guarantees based on internationally recognised standards. This has been an important carrot for investors looking to operate and build relationships with jurisdictions far different to their own. To deal with the increasingly problematic matter of foreign investment in armed conflict however, international investment protection law must be accurately applied and utilised.

This paper will analyse the extent to which international investment protection law can be applied to armed conflict scenarios. In particular, it will focus on the armed conflicts currently occurring in Libya and Syria as practical examples. These armed conflicts were selected due to their contemporary nature and their active foreign investment sphere, with both States operating significant resource extraction industries with the help of foreign investment. Libya and Syria were also selected due to the experiences of foreign investments in each State, with resource extraction playing an almost central role in the policies, directions and even targets which have punctuated both armed conflicts.

Specifically, this paper will analyse the effectiveness and operability of the treaties, jurisprudence and custom of international investment protection law in the Libyan and Syrian armed conflicts from the perspective of foreign investors and States. Separated into nine substantive chapters, it will first focus on the layout of contemporary investment protection law. It will then outline the situations in Libya and Syria, qualifying their conditions in light of international law, and determining the precise nature of their respective armed conflicts. An

analysis of the effects of armed conflict on the operation of international investment protection law (specifically the operation of treaties) will follow, before detailing the specific obligations which Libya and Syria must adhere to. The crux of the paper is an analysis of the laws and protections binding upon Libya and Syria within their respective armed conflicts. This analysis is performed in light of the practical scenarios, foreign investors and investments which are a feature of the economic landscape of the two States, and includes an application of the laws of armed conflict. Further attention is paid to the defences against liability potentially available to Libya and Syria, and the effects which each State's armed conflict may have on foreign investment, liabilities and arbitration generally.

2. What is the investment protection regime?

The current investment protection regime is composed of a number of international legal instruments. Each of these instruments work to implement a framework within which foreign investment (involving an investor from a particular State providing funding or capital towards an enterprise or project situated in another State) can operate with guaranteed protections and assistance. The three primary mechanisms or instruments which govern the protection of foreign investments are Bilateral Investment Treaties (BITs), multilateral treaties and customary international law.

2.1 Bilateral Investment Treaties

BITs are designed to provide guarantees for foreign investments. These guarantees are derived from the binding obligations placed upon contracting parties to the treaty[1]. The protections outlined in a BIT become relevant where an investor who is a national of a State party to the treaty wishes to initiate an investment dispute with the investment host State, who is also a party to the treaty. BITs typically contain a number of standard provisions; this is exemplified by the use of "Model BITs" by certain States[2]. These standard provisions include a definition for the term "investment", which aids in defining the jurisdictional limits of any potential dispute arising between parties to the treaty. Definitions for the term "investor" are also prevalent, and again help to frame the applicable circumstances in which an investment dispute can arise within the scope of the BIT.

The primary provisions of BITs however, exist in the form of various protections offered to the investor in a host State. These protections may include some or all of the following: guarantees of fair and equitable treatment, guarantees of full protection and security, protections against arbitrary and discriminatory treatment, national and most-favoured nation (MFN) treatment, guarantees of compensated expropriation and settlement of disputes via arbitration[3]. These provisions form protections which an investor may rely on and apply in situations of investment disputes. In effect, the protections contained in BITs work to prevent investment host States from taking advantage of an investor's actions in their State, thus

[1] Christoph Schreuer, 'Investments, International Protection', January 2011, <http://www.univie.ac.at/intlaw/wordpress/pdf/investments_Int_Protection.pdf> accessed 5 July 2015, para. 7

[2] Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law* (2nd edn, OUP, 2012), p. 13

[3] Supra note 1, para. 8

promoting and encouraging investors to operate in a multitude of environments, including those where investment would likely carry a high risk.

The standards of protection present within BITs may remain relevant in an armed conflict scenario, with some conceptual deviations and notable exceptions. Protections against arbitrary and discriminatory treatment and national and MFN treatment may operate prominently in armed conflict scenarios, insofar as they ensure all investors receive an appropriate (and consistent) level of care and protection available during armed conflict. The concepts of fair and equitable treatment and compensated expropriation may operate within armed conflict where the States (or elements under control of the State) act to impede the use of an investment, or where the investor has been treated unfairly. Both concepts however undergo significant conceptual changes within times of armed conflict, and may be influenced by other BIT provisions pertaining to armed conflict, customary international law or the laws of armed conflict.

2.2 Multilateral Treaties

Multilateral treaties operate so as to provide a number of States with reciprocal protections and obligations for investors possessing their nationality and for themselves in the case they become investment host States[4]. Multilateral treaties typically contain those protections outlined above which are present in BITs, including those regarding fair and equitable treatment, national and most favoured national treatment, expropriation and arbitration. In addition, many multilateral treaties incorporate provisions regarding their own judicial processes, for example by outlining the jurisdictional limits and procedure of any arbitration conducted within its own facilities.

Prominent examples of multilateral treaties include the North American Free Trade Agreement (NAFTA) between the United States of America (USA), Mexico and Canada, which covers matters of trade and investment[5], the Energy Charter Treaty (ECT) covering cooperation of European States with Russia, Eastern and Central Europe in the energy sector[6],

[4] Supra note 2, p. 15
[5] North American Free Trade Agreement (adopted 17 December 1992, entered into force 1 January 1994) 32 ILM 289
[6] Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95

and the International Convention on the Settlement of Investment Disputes (ICSID) providing a framework for the settlement of disputes[7].

2.3 Customary international law and other international standards

Customary international law also plays a decisive role regarding investment protection. The treaty-based rules outlined above should be interpreted in light of the general rules of international law, and be supplemented by the relevant rules of international law applicable between the parties[8].

The applicable rules of international law between parties to an investment dispute may potentially include the international rules regarding the nationality of individuals and corporations. International minimum standards regarding the treatment of aliens, rules on attribution, State responsibility and damages may also be relevant in an armed conflict scenario involving the protection of an investment. These international minimum standards are exemplified via the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles on State Responsibility)[9]. These Articles include provisions for the responsibility of States in times of armed conflict, and for the responsibility of certain groups under the State's control. The Articles also provide for the concepts of force majeure and necessity, which may be raised as a relevant defence by a State where the protection of an investment within armed conflict is sought. In addition, the International Law Commission's Draft Articles on the Effects of Armed Conflicts on Treaties (ILC Effects Articles)[10] may be deemed relevant. These Articles provide guidelines as to the application of treaties within armed conflict situations, including those treaties relating to investment protection.

[7] International Convention on the Settlement of Investment Disputes (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159
[8] Vienna Convention on the Law of Treaties, (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, Article 31 (3) (c)
[9] UNGA 'Report of the International Law Commission' (23 April 2001) UN Doc A/56/10
[10] UNGA Res 66/99 (27 February 2012) UN Doc A/RES/66/99

3. What is an armed conflict?

The law of armed conflict includes legal concepts which regulate the conduct of armed hostilities in times of conflict, and which protect particular individuals involved in the conflict[11]. The law of armed conflict is depicted predominately within the Geneva Conventions[12]. Armed conflict is defined within the Geneva Conventions to incorporate two distinct forms: international armed conflicts, and non-international armed conflicts. International armed conflict is defined within common Article 2 of the Conventions as all cases of declared war or any other armed conflict arising between two or more States, even if a State of war has not been recognised by one of the States[13]. Regarding conflicts of an international nature, all four Geneva Conventions will apply, in addition to Additional Protocol I, which extends the definition of international armed conflict contained within the Conventions to armed conflict in which peoples are fighting against colonial domination, racist regimes or alien occupation[14].

Non-international armed conflict is defined within common Article 3 to include armed conflicts which are not of an international character, and which occur in the territory of a State[15]. The laws applicable to non-international conflicts, as defined within the Geneva Conventions, are common Article 3, and Additional Protocol II which aims to extend the essential rules of the law of armed conflict to internal wars[16]. Additional Protocol II also defines a threshold as to the 'extent' of armed conflict required before a non-international armed conflict may arise, providing that armed forces should exercise control over a territory to such an extent that it allows them to carry out "sustained and concerted" military operations[17].

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[11] G. Venturini, 'Necessity in the Law of Armed Conflict and in International Law' [2010] 41 NYBIL 45, p. 45

[12] 1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31, 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85, 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135, 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287

[13] *Ibid*, Article 3

[14] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3

[15] Supra note 12, Article 3

[16] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609

[17] *Ibid*, Article 1

There exists varying interpretations as to what circumstances will fulfil the negative definition of non-international armed conflict stipulated within common Article 3 (armed conflicts not of an international character). The International Committee of the Red Cross (ICRC) commentary to common Article 3, for example, provides a list of cases which would qualify as a non-international armed conflict. These cases include where an insurrectionist movement possesses an organised military force, a responsible authority, determinate territory, *de facto* control over a population, and are capable of respecting and ensuring respect for the Geneva Conventions. According to the commentary, a non-international armed conflict may also arise where the *de jure* government has recognised the insurgents as belligerents or has claimed for itself the rights of a belligerent[18].

In contrast to the rather detailed definition of non-international armed conflict provided by the ICRC, the International Criminal Tribunal for the former Yugoslavia (ICTY) takes an alternate approach. In its *Tadic* decision, the ICTY outlined that a non-international armed conflict exists where there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups, or between such groups within a State[19]. This definition has seemingly received ongoing support, with a similar definition being provided by both the Rome Statute of the International Criminal Court (Rome Statute)[20] and the ILC Effects Articles[21]. Therefore, according to this definition of non-international armed conflict, what is required is a certain level of organisation of the relevant armed groups involved, in addition to a 'protracted' exercise of armed force. Short-lived events including riots and other civil disturbances will not qualify as armed conflict under this definition, however ongoing insurrectionist action by or between organised groups with clear structures may well do so.

[18] J. Pictet, Commentary of the First Geneva Convention, ICRC 1952, p. 49-50
[19] *Prosecutor v Tadic*, (Opinion and Judgment) IT-94-1-T (7 May 1997), p. 193
[20] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, Article 8(2)(f)
[21] Supra note 10, Article 2 (b)

3.1 Libya

Protests and civil disturbances began in Libya on 15 February 2011, predominately in Benghazi[22]. By 20 February 2011, these protests and civil disturbances had transformed into a fully fledged armed insurrectionist movement, which by now had taken control of the city of Benghazi. This transformation arguably resulted in the protests which had taken place in Libya, and which had formed part of the greater 'Arab Spring' taking place within the North Africa and Middle East region, developing into a non-international armed conflict[23]. In their efforts to take control of Benghazi, the insurrectionist movement entered into armed combat with the Libyan government, led by Muammar Gaddafi, and centred in the State's capital city Tripoli[24]. Central to the capture of Benghazi by insurrectionist forces was the fall of the Katiba, a military base, by insurrectionist fighters armed with rifles and bombs[25]. Such activity, particular the use of weaponry to overthrow government control and military objectives over a number of days, evidences a 'protracted' use of armed force of the kind described by the ICTY in its *Tadic* decision. Following these events, it became apparent that insurrectionist forces were developing a system of military coordination, with steps aimed at constructing a unified command (partially consisting of defected Libyan army officers)[26] demonstrating the type of organisation and structure outlined within the *Tadic* decision, and by the ICRC in their definitions of non-international armed conflict.

The non-international character of the armed conflict in Libya was augmented by an international aspect following foreign intervention. This intervention was brought about following the United Nations Security Council's (UNSC) passing of Resolution 1973 on 17 March 2011, which authorised UN member States 'to take all necessary measures' to protect the Libyan people[27]. The resolution was followed by the commencement of air strikes by

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[22] Al Jazeera, 'Battle for Libya: Key moments' (*Al Jazeera*, 23 August 2011) <http://www.aljazeera.com/indepth/spotlight/libya/2011/08/20118219127303432.html> accessed 6 July 2015

[23] *Ibid*

[24] *Ibid*

[25] Al Jazeera, 'The day the Katiba fell' (*Al Jazeera*, 1 March 2011) <http://www.aljazeera.com/indepth/spotlight/libya/2011/03/20113175840189620.html> accessed 6 July 2015

[26] David D. Kirkpartick & Kareem Fahim, 'Insurrectionists in Libya Gain Power and Defectors' (*New York Times*, 27 February 2011) <http://www.nytimes.com/2011/02/28/world/africa/28unrest.html?_r=0> accessed 6 July 2015

[27] S/RES/1973 (2011)

North Atlantic Treaty Organisation (NATO) forces, including the USA and France[28]. As was provided by the ICTY in *Prosecutor v Rajic* (*Rajic*), foreign intervention of this sought in support of insurrectionists against a government will transform a non-international armed conflict into an international armed conflict[29]. Thus, it seems likely that upon the commencement of armed intervention by NATO forces against the Libyan government, and in support of that State's insurrectionist forces, the non-international armed conflict which had existed in Libya was altered in such a way as to constitute an international armed conflict. Foreign intervention in Libya continued until the death of Muammar Gaddafi in October 2011, when NATO declared its use of armed force in the State would conclude on 31 October 2011[30]. Thus, armed conflict in Libya from the beginning of foreign intervention and until this point should be qualified as an international armed conflict.

Following the conclusion of the NATO intervention, the conflict in Libya reverted to a singular non-international armed conflict. Militia who had participated in the armed insurrection shifted their fighting against rival movements, and participated in high-profile attacks including that against the USA consulate building in Benghazi in September 2012[31]. The continuation of insurrectionist activity led to the newly created Libyan government engaging in raids against the militia groups[32], and resulted in eventual attacks by certain militia groups on the newly constituted government (the General National Congress)[33]. These attacks grew into a greater non-international armed conflict between four dominant groups within Libya. These groups include the Libyan Army, acting in support of the Council of Deputies elected to government in June 2014[34], and 'Libya Dawn', a militia faction supporting the General National Congress, who dispute the result of the June 2014 elections and who have established a rival government[35]. The conflict, which has arguably transformed

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[28] David D. Kirkpatrick, Steven Erlanger & Elisabeth Bumiller, 'Allies Open Air Assault on Qaddafi's Forces in Libya' (*New York Times*, 19 March 2011) <http://www.nytimes.com/2011/03/20/world/africa/20libya.html?pagewanted=all> accessed 6 July 2015

[29] *Prosecutor v Rajic*, Review of the Indictment, ICTY-95-12 (13 September 1996), para. 21

[30] BBC News, 'Muammar Gaddafi's death: NTC commander speaks' (*BBC News*, 22 October 2011) <http://www.bbc.com/news/world-africa-15412529> accessed 6 July 2015

[31] BBC News, 'Benghazi US consulate attack: Timeline' (*BBC News*, 16 November 2012) <http://www.bbc.com/news/world-africa-19587068> accessed 6 July 2015

[32] Al Jazeera, 'Libyan forces raid militia outposts' (*Al Jazeera*, 23 September 2012) <http://www.aljazeera.com/news/africa/2012/09/201292322112643978 7.html> accessed 6 July 2015

[33] Al Jazeera, 'Gunfire erupts outside Libyan parliament' (*Al Jazeera*, 19 May 2014) <http://www.aljazeera.com/news/middleeast/2014/05/gunfire-erupts-outside-libyan-parliament-201451814131864438 2.html> accessed 6 July 2015

[34] BBC News, 'Libya supreme court 'invalidates' elected parliament' (*BBC News*, 6 November 2014) < http://www.bbc.com/news/world-africa-29933121> accessed 6 July 2015

[35] *Ibid*

into a civil war, also involves the Islamic militia group Ansar al-Sharia, which acts in apparent support of the rival General National Congress government[36], and the Islamic State of Iraq and Syria's (ISIS) Libyan operations, which has gained control of portions of Libyan territory[37]. Each group displays high levels of organisation and military coordination, and engage in protracted armed force against each other[38], thus, the current situation in Libya should be classified as a non-international armed conflict.

3.2 Syria

The armed conflict currently taking place in Syria should be classified as a non-international armed conflict. Civil unrest began in earnest in Syria during March 2011. This unrest took place within the context of the wider Arab Spring movement which, much like the situation in Libya, had spurred protests and popular discontent with governments throughout North Africa and the Middle East[39]. This civil unrest intensified following the formation of the Free Syrian Army (FSA) by Syrian Army defectors, allegedly in July 2011[40]. The FSA and other associated insurrectionist groups participated in a number of armed conflicts with Syrian government forces from this point, including the Siege of the city of Homs[41], and fighting within suburban Damascus and other Syrian cities, including Aleppo[42]. In March 2012, the FSA announced the creation of a 'Joint Military Command of the Syrian Revolution', aimed at unifying and organising all insurrectionist factions active within Syria into a single coordinated armed group[43]. Ongoing fighting led to the designation of a civil war in Syria by

[36] BBC News, 'Guide to key Libyan militias' (*BBC News*, 20 May 2014) < http://www.bbc.com/news/world-middle-east-19744533> accessed 6 July 2015
[37] Jason Pack & Mattia Toaldo, 'Why Picking Sides in Libya Won't Work' (The Atlantic, 6 March 2015) < http://foreignpolicy.com/2015/03/06/libya-civil-war-tobruk-un-negotiations-morocco/> accessed 6 July 2015
[38] The Economist, 'Libya's civil war: An oily mess' (*The Economist*, 11 April 2015) <http://www.economist.com/news/middle-east-and-africa/21648054-negotiations-fail-progress-one-side-tries-grab-oil-revenue-oily> accessed 6 July 2015
[39] BBC News, 'Mid-East unrest: Syrian protests in Damascus and Aleppo' (*BBC News*, 15 March 2011) <http://www.bbc.com/news/world-middle-east-12749674> accessed 6 July 2015
[40] BBC News, 'Syria defectors 'attack military base in Harasta' (*BBC News*, 16 November 2011) <http://www.bbc.com/news/world-middle-east-15752058> accessed 6 July 2015
[41] BBC News, 'Syria conflict: Government troops move into Homs Old city' (*BBC News*, 9 May 2014) <http://www.bbc.com/news/world-middle-east-27347718> accessed 6 July 2015
[42] Neil MacFarquhar,
'Both Sides Claim Progress as Violence Continues in Syria' (*New York Times*, 22 July 2012) <http://www.nytimes.com/2012/07/23/world/middleeast/battles-continue-in-aleppo-and-damascus.html> accessed 6 July 2015
[43] UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UNHRC 21st Session No 4 UN Doc A/HRC/21/50 (2012), Annex II, para. 9

the United Nations (UN) in June 2012[44], and in August 2012, the UN Human Rights Council determined the armed conflict in Syria had surpassed the threshold of non-international armed conflict[45]. In addition to the FSA, other insurrectionist groups have contributed to the non-international armed conflict[46]. These groups include the al Nusra Front (an Islamist militant group)[47] and ISIS[48].

There has undoubtedly been a level of ongoing foreign involvement in the Syrian civil war. This has occurred either indirectly, via the supply of weaponry or funding, or through direct attacks by foreign forces against certain participants within the conflict. In particular, States such as the USA[49], Jordan, United Arab Emirates, Saudi Arabia, Bahrain and Qatar[50], and entities such as the European Union[51] have provided 'non-lethal military aid' and 'technical assistance' to Syrian insurrectionist forces, while the USA has conducted air strikes against the activity of ISIS[52] and other Islamic militant groups (including those linked to al-Qaeda)[53] within Syrian territory during the conflict. These actions should not however result in the transformation of the conflict from non-international to international, as the States supplying weaponry and other forms of assistance cannot be shown to have overall or effective control (standards espoused by the ICTY in *Tadic*[54] and by the International Court of Justice in *Nicaragua v United States of America*[55] to determine State control of non-State armed groups) over the activity of the insurrectionist movements, including the FSA[56]. Furthermore,

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[44] BBC News, 'Syria in civil war, says UN official Herve Ladsous' (*BBC News*, 12 June 2012) <http://www.bbc.com/news/world-middle-east-18417952> accessed 6 July 2015
[45] Supra note 43, para. 12
[46] UNGA 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' UNHRC 27th Session No 4 UN Doc A/HRC28/69 (2015), para. 1
[47] *Ibid*, para. 25
[48] *Ibid*, para. 33
[49] U.S. Department of State 'U.S. Government Assistance to Syria' (*U.S. Department of State*, 9 May 2013) <http://www.State.gov/r/pa/prs/ps/2013/05/209197.htm> accessed 6 July 2015
[50] BBC News, 'Syria: US begins air strikes on Islamic State targets' (*BBC News*, 23 September 2014) <http://www.bbc.com/news/world-middle-east-29321136> accessed 12 July 2015
[51] BBC News 'EU paves way for Syrian opposition aid' (*BBC News*, 18 Febuary 2013) < http://www.bbc.com/news/world-middle-east-21500837> accessed 6 July 2015
[52] [52] 'Remarks by the President After Meeting with Chiefs of Defense' (*The White House*, 14 October 2014) < https://www.whitehouse.gov/the-press-office/2014/10/14/remarks-president-after-meeting-chiefs-defense> accessed 6 July 2015
[53] Cheryl Pellerin, 'DOD Official: Successful Syrian Strikes Only the Beginning (*U.S. Department of Defense News*, 23 September 2014), <http://www.defense.gov/news/newsarticle.aspx?id=123241> accessed 6 July 2015
[54] *Prosecutor v Tadic*, (Judgment) IT-94-1-A (15 July 1999), para. 120
[55] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, para. 115
[56] Louside Arimatsu & Mohbuba Choudhury, 'The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya', Chatham House International Law Program Paper (March 2014), p. 16

airstrikes conducted by States including the USA have not been sanctioned by the UNSC and as such do not transform the non-international armed conflict in the manner depicted by the ICTY in *Rajic*[57].

[57] Supra note 29

4. Obligations to protect investments during armed conflict under treaties

4.1 The application of treaties in investment protection

As aforementioned, BITs form an integral component of the contemporary investment protection paradigm. BITs provide for specific obligations and protections which may be applied to States, such as Libya and Syria, regarding foreign investment. In doing so, BITs provide a clear and agreed method of redress, available for example through arbitration, through which international corporations active within these States may receive damages or compensation for any adverse effects occurring against their investments.

The application of the obligations and protections contained within various BITs to an arbitration proceeding may be provided within the BIT itself. The Austria-Libya BIT, for example, provides that the applicable law in any investment arbitration carried out between the two States will include those obligations and protections contained within the BIT, in addition to any applicable rules and principles of international law[58]. Similarly, the India-Syria BIT provides that arbitration between the two States shall be conducted in line with provisions of the BIT, and applicable international law[59].

In specific cases, there exists no obvious or express agreement within the BIT as to the applicable law to be followed in an arbitration proceeding. In such an event, Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) -of which Austria, Germany, Italy, Spain, Syria and China, are a party to[60] - provides that the arbitral tribunal shall apply host State law, and applicable rules of international law (including those obligations and protections contained in the relevant BIT)[61]. While Libya is a not party to the ICSID Convention, guidance as to the applicable arbitral law may be taken from the United Nations Commission on International Trade Law's

[58] Agreement between the Republic of Austria and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments (Austria-Libya) (adopted 18 June 2002, entered into force 1 January 2004), Article 14 (1)

[59] Agreement between the Government of the Republic of India and the Government of the Syrian Arab Republic on the Mutual Promotion and Protection of Investments (India-Syria) (adopted 18 June 2008, entered into force 22 January 2009), Article 9 (5)

[60] International Centre for Settlement of Investment Disputes, 'Database of ICSID Member States' (*International Centre for Settlement of Investment Disputes*) <https://icsid.worldbank.org/apps/ICSIDWEB/about/Pages/Database-of-Member-States.aspx?tab=AtoE&rdo=BOTH> accessed 3 August 2015

[61] Supra note 7

Model Law on International Commercial Arbitration (UNCITRAL Rules)[62]. Article 28 of the UNICTRAL Rules provides that an arbitral tribunal will first apply the law agreed between the parties, and where there is no agreement the law which is determined to be appropriate by the tribunal (that is, either domestic, or international law) will be applied[63]. The International Chamber of Commerce's Rules of Arbitration (ICC Rules) may also frame the applicable arbitral law, with Article 21 providing that in the absence of any agreement as to applicable law between the parties to the dispute, the arbitral tribunal shall apply the rules of law it considers appropriate[64].

In the case that both international and domestic law apply to the arbitral proceedings, arbitral jurisprudence supports the contention that international law, including the obligations and protections contained within BITs, must hold sway. The tribunal in *Amco Asia Corp et al. V The Republic of Indonesia*, in its resubmitted award decision, held that applicable host State laws must be checked against international law and where there exists conflict between the two, international law shall prevail[65]. Similarly, in *LG & E v Argentina*, the tribunal held that international law overrides domestic law where there is a contradiction between the two, as a State cannot justify non-compliance of international obligations via the application of its own domestic law[66]. Additionally, some tribunals have gone as far as providing that the obligations and protections contained in BITs may constitute *lex specialis*, and thus shall prevail over rules of customary international law[67].

Therefore, it appears likely that the obligations and protections contained within BITs between Libya, Syria and relevant third States will provide a framework in which damages or compensation for the breach of such provisions may be awarded by an arbitral tribunal. This may occur via express agreement as to the application of BITs as the operable law in arbitral proceedings, as exists between Austria and Libya, and between Syria and India. It may also occur via the use of the ICSID Convention and pre-determined rules (such as the UNCITRAL or ICC Rules), which provide for the dual application of both international and domestic law,

[62] United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration 1985: With amendments as adopted in 2006* (United Nations, 2008)
[63] *Ibid*, Article 28 (2)
[64] International Chamber of Commerce, *Arbitration Rules* (International Chamber of Commerce, 2013), Article 21 (1)
[65] *Amco Asia Corp. et al. v The Republic of Indonesia*, Resubmitted award decision, ICSID Case No ARB/81/8, 5 June 1990, para. 40
[66] *LG & E Energy Corp., LG & E Capital Corp., LG & E International Inc. v Argentine Republic*, Decision on liability, ICSID Case No ARB/02/1, 3 October 2006, para. 94
[67] *ADC Affiliate et al. v Hungary*, Award, ICSID Case No ARB/03/16, 2 October 2006, para. 481

but which must be read in light of arbitral jurisprudence providing for the supremacy of international law in the case of contradiction between the two.

4.2 Obligations to protect investments during armed conflict under treaties

The obligations and protections contained within BITs, as explained above, may exist as a tool capable of delivering damages and compensation for their breach, as found in a relevant arbitral tribunal. These BITs, and their respective obligations and protections, will arguably continue to operate (and thus provide appropriate means of investment protection within arbitral proceedings) throughout an armed conflict.

The ILC Effects Articles define armed conflict as 'a situation in which there is resort to armed force between States or protracted armed force between governmental authorities and organised armed groups'[68]. This definition incorporates the aspects of armed conflict provided by the ICTY in its *Tadic* decision, and within the Rome Statute, namely protracted armed force and a level of organisation of the armed groups involved. Therefore, it can be argued that the events in Libya and Syria (having both qualified as armed conflicts under the *Tadic* and Rome Statute definitions) may also be considered as armed conflicts as per the ILC Effects Articles. In addition, the ILC Effects Articles do not discern between international and non-international armed conflict[69], thus rendering any application of these separable concepts to events in Libya and Syria irrelevant for the purpose of this analysis. The ILC explains that such lack of distinction is used to avoid the reflection of specific factual or legal scenarios, and so as to prevent the risk of *a contrario* interpretations[70].

Article 3 of the ILC Effects Articles provides that an armed conflict does not *ipso facto* terminate or suspend the operation of treaties either between States parties to the conflict, or between a State party to the conflict and a State that is not[71]. The ILC Articles further provide that the subject matter of treaties of commerce and agreements concerning private rights involves an implication they will continue in operation during armed conflict[72]. As provided in the commentary to the ILC Effects Articles, the category of 'agreements concerning private

[68] Supra note 10, Article 2 (b)
[69] UNGA Res 66/99 (27 February 2012) UN Doc A/RES/66/99 with Commentaries, Article 2, para. 9
[70] *Ibid*
[71] Supra note 10, Article 3
[72] Supra note 10, Article 7 & Annex (e)

rights' refers to, *inter alia,* bilateral investment treaties[73]. As per Article 12 of the ILC Effects Articles, where a treaty contains express provisions on its operation in situations of armed conflict, then these provisions will apply[74]. States may terminate or suspend a treaty (or part of a treaty) operative between them in situations of armed conflict[75], however such an intention to terminate or suspend must be notified to the other State party, or the treaty's depositary[76]. Obligations existing under international law (independently of the treaty) will remain unaffected by any such termination or suspension of the treaty due to armed conflict[77], while the rights and obligations of State parties regarding dispute settlement also remain unaffected[78]. The ILC Articles are however without prejudice to the termination, withdrawal or suspension of treaties as a consequence of supervening impossibility of performance[79].

[73]Supra note 69, Annex (e), para. 48
[74] Supra note 10, Article 12 (a)
[75] Supra note 10, Article 8 (2)
[76] Supra note 10, Article 9 (1)
[77] Supra note 10, Article 10
[78] Supra note 10, Article 9(5)
[79] Supra note 10, Article 18 (b)

5. Effects of armed conflict on foreign investment in Libya and Syria

5.1 Effect of armed conflict on foreign investment in Libya

Libya hosts a number of foreign investments, particularly within the energy and resource extraction sector of its economy. The State hosts various foreign oil and gas companies which operate production and export facilities within Libya, or which have engaged in oil and gas exploration throughout Libyan territory. These companies include Italy's ENI, Spain's Repsol, Germany's Wintershall (a subsidiary of BASF), the Netherlands' Royal Dutch Shell (Shell), and the UK's BP[80].

The conflict in Libya has threatened foreign investment within the State, resulting in potential damage and destruction to a number of foreign owned facilities and operations. During the early phases of the non-international armed conflict in Libya, a number of these companies, including Eni, Wintershall and Repsol, cut their oil production and exports in light of the increasingly unstable and insecure environment in the State[81]. Other companies, such as Shell and Austria's OMV withdrew expatriate staff in light of the danger[82]. OMV, which ran major oil extraction operations in Libya, reported in April 2011 that oil flowing from its Shateira oil field, in eastern Libya, had ceased[83]. As the conflict progressed, installations vital to the Libyan oil industry and to foreign investment came under fire. Notably, the oil terminal and facilities in the town of Brega received damage from pro-government and NATO forces[84] over the course of four separate battles for the control of its facilities and surrounding township between March and August 2011[85]. Foreign investors with operations in the Brega

[80] Guy Chazan, 'Oil Companies Suspend Operations in Libya' (*Wall Street Journal*, 22 February 2011) <http://www.wsj.com/articles/SB10001424052748704476604576157741151638086> accessed 12 July 2015

[81] Rachel Graham, 'Eni, Wintershall, Total, Repsol Cut Libyan Oil Output' (*Bloomberg*, 24 February 2011) <http://www.bloomberg.com/news/articles/2011-02-24/eni-wintershall-total-repsol-cut-libyan-oil-output-table-> accessed 12 July 2015

[82] Vera Eckert & Daniel Fineren, 'Libya unrest stops some oil output, firms move staff' (*Reuters*, 21 February 2011) <http://www.reuters.com/article/2011/02/21/us-bp-libya-idUSTRE71K1WY20110221> accessed 12 July 2015

[83] Zoe Schneeweiss, 'Libya Fields Go Missing as Eni Walks Between Qaddafi, Insurrectionists' (*Bloomberg*, 14 April 2011) <http://www.bloomberg.com/news/articles/2011-04-14/libya-fields-go-missing-as-eni-walks-between-qaddafi-insurrectionists> accessed 12 July 2015

[84] Javier Blas, 'War damage to hit return of Libya crude' (*Financial Times*, 6 September 2011) <http://www.ft.com/cms/s/0/c382946a-d7b5-11e0-a06b-00144feabdc0.html#axzz3ftSuqc7t> accessed 12 July 2015, International Business Publications, USA, *Libya Oil and Gas Exploration Laws and Regulation Handbook* (International Business Publications, 2008) p. 48

[85] Evan Hill, 'The battle for Brega' (*Al Jazeera*, 3 March 2011) <http://www.aljazeera.com/news/africa/2011/03/2011332015604915.html> accessed 12 July 2015; BBC News, 'Libya: Gaddafi troops 'force insurrectionists out of Brega' (*BBC News*, 13 March 2011) <http://www.bbc.com/news/world-africa-12726032> accessed 13 March 2011; Chris McGreal, 'Libyan insurrectionists deny crisis after assault on Brega fails' (*The Guardian*, 31 March 2011) <http://www.theguardian.com/world/2011/mar/31/libya-insurrectionists-brega-assault-fails> accessed 12 July

facilities include Eni[86], which was additionally involved in operations at the Zawiya oil terminal[87], the target of fighting between Libyan and insurrectionist forces in August 2011[88]. Shell also held interests in the resource extraction industry of Brega, having entered into an agreement to upgrade an existing liquid natural gas (LNG) facility in the area in 2005[89]. Additionally, oil facilities in the town of Ras Lanuf, on the Gulf of Sidra coastline, came under attack in September 2011[90].

The continuation of the conflict following the removal from power of the Libyan government by insurrectionist forces led to further threats to foreign investment in the State. Militias and protestors continued to control a number of Libya's oil ports and terminals following the completion of the initial conflict phase in late 2011, resulting in oil production and exports dropping significantly[91]. In July 2014, Eni and Repsol evacuated expatriate employees from Libya in light of security concerns[92], while in November 2014 militants seized the Hariga oil port[93] and the El Sharara oil field (jointly run by Repsol, OMV and France's Total, with Libya's National Oil Corporation (NOC)), halting oil production[94]. In December 2014, fighting between rival militias spread to the Mellilah oil port, jointly run by Eni and NOC[95]. The affects on Libya's oil industry and foreign investment continued into 2015; in March

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2015; BBC News, 'Libya conflict: Gaddafi fights back as insurrectionists advance' (*BBC News*, 20 August 2011) <http://www.bbc.com/news/world-africa-14603989> accessed 12 July 2015

[86] Eni, 'Eni North Africa: Sustainability Report 2009' <http://www.eni.com/it_IT/attachments/sostenibilita/allegati-sostenibilita/eni-north-africa-2009-eng.pdf> accessed 12 July 2015, p. 11

[87] *Ibid*

[88] BBC News, 'Libya conflict: Insurrectionists fight for Zawiya oil refinery' (*BBC News*, 17 August 2011) <http://www.bbc.co.uk/news/mobile/world-africa-14561904> accessed 12 July 2015

[89] BBC News, 'Shell forges Libyan gas deal' (*BBC News*, 3 May 2005) <http://news.bbc.co.uk/2/hi/business/4509827.stm> accessed 12 July 2015

[90] Rob Crilly, 'Libya: 15 killed as Gaddafi loyalists attack oil refinery' (*The Telegraph*, 12 September 2011) <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8757847/Libya-15-killed-as-Gaddafi-loyalists-attack-oil-refinery.html> accessed 12 July 2015

[91] Ulf Laessing, 'Libya's army tells militias, protestors to free up oil imports' (*Reuters*, 1 December 2013) <http://www.reuters.com/article/2013/12/01/us-libya-security-oil-idUSBRE9B003D20131201> accessed 12 July 2015

[92] Benoit Faucon, 'Eni, Repsol Expatriates Evacuated from Libya' (*Wall Street Journal*, 20 July 2014) <http://www.wsj.com/articles/eni-repsol-expatriates-evacuated-from-libya-1405893922> accessed 12 July 2015

[93] Ayman Al-Warfalli & Ahmed Elumami, 'Libyan protestors seize eastern oil port as Benghazi toll hits 300' (*Reuters*, 8 November 2014) <http://www.reuters.com/article/2014/11/08/us-libya-oil-idUSKBN0IS0CU20141108> accessed 12 July 2015

[94] Feras Bosalum & Ahmed Elumami, 'Gunmen storm Libya's El Sharara oilfield, shut down production' (*Reuters*, 5 November 2014) <http://www.reuters.com/article/2014/11/06/us-libya-oil-sharara-idUSKBN0IP27D20141106> accessed 12 July 2015

[95] Ayman Al-Warfalli & Ulf Laessing, 'Libya fighting spreads to third oil port, 11 killed in Benghazi' (*Reuters*, 22 December 2014) <http://www.reuters.com/article/2014/12/22/us-libya-security-idUSKBN0K011T20141222> accessed 12 July 2015

2015 eleven oil fields closed following attacks by ISIS[96], in April 2015 the El Feel and Wafa oil fields (jointly operated by Eni and NOC) were forcefully shut by armed security guards and protestors[97], and in May 2015 the State's Zuetina oil port was shut[98].

5.2 Effects of armed conflict on foreign investment in Syria

Prior to the non-international armed conflict in Syria, the State hosted a number of foreign investments, particularly within its energy and resource extraction industry. Foreign corporations involved in Syria included Shell[99], Total[100], and India's Oil and Natural Gas Corporation Videsh (ONGC Videsh)[101], which operated oil extraction and production facilities within Syria's eastern Al Dei Zor region, with operations particularly focussed on the al-Omar and Tarnak oil fields[102]. Other corporations with investments in Syria included the UK's Gulfsands, which operated an oil deposit termed "Block 26" in north-eastern Syria[103], Emerald Energy (a subsidiary of China's Sinochem) which partnered with Gulfsands[104], and Canada's Suncor, which operated its Ebla gas production facility within the Central Syrian Gas Basin[105].

Relatively minimal foreign investment occurs in industries outside of energy and resource extraction; however some European corporations have endeavoured to become involved in

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[96] The Associated Press, 'Libya Declares 11 Oil Fields Closed After ISIS Attacks' (*The New York Times*, 5 March 2015) <http://www.nytimes.com/aponline/2015/03/05/world/middleeast/ap-ml-libya-oil.html> accessed 12 July 2015

[97] Feras Bosalum, 'Libyan chaos threatens more oilfields, power supply and gas exports to Italy' (*Reuters*, 29 April 2015) <http://www.reuters.com/article/2015/04/29/libya-oil-exports-idUSL5N0XQ67N20150429> accessed 12 July 2015

[98] Feras Bosalum & Ayman Al-Warfalli, 'Halt to Libya's Zueitina oil port, linked fields cut output more' (*Reuters*, 5 May 2015) <http://www.reuters.com/article/2015/05/05/us-libya-oil-idUSKBN0NQ1V320150505> accessed 12 July 2015

[99] Shell, 'CNPC acquires 35% interest in Syria Shell Petroleum Development' (*Shell*, 18 May 2010) <http://www.shell.com/global/aboutshell/media/news-and-media-releases/2010/cnpc-syria-17052010.html> accessed 12 July 2015

[100] Jerome Schmitt, 'Total Signs Three Oil and Gas Agreements in Syria' (*Reuters*, 4 September 2008) <http://www.reuters.com/article/2008/09/04/idUS175669+04-Sep-2008+BW20080904> accessed 12 July 2015

[101] Oil and Natural Gas Corporation Limited, 'ONGC Videsh Limited – Introduction' (*Oil and Natural Gas Corporation Limited*) <http://www.ongcindia.com/wps/wcm/connect/ongcindia/Home/SubsidiariesJVs/Subsidiaries/ONGC+Videsh+Limited/> accessed 12 July 2015

[102] *Ibid*

[103] Gulfsands Petroleum, 'Block 26, Syria' (*Gulfsands Petroleum*) <http://www.gulfsands.com/s/Syria.asp> accessed 12 July 2015

[104] Sinochem, 'Emerald Energy PLC' (*Sinochem*) <http://english.sinochem.com/g858/s1655/t4345.aspx> accessed 12 July 2015

[105] Suncor, 'Syria' (*Suncor*) <http://www.suncor.com/en/about/3988.aspx> accessed 12 July 2015

Syrian infrastructure. In particular, an unidentified German company began investing in the development of a waste water treatment facility in the Syrian city of Kanaker, which was hoped to be completed by 2013[106].

The conflict in Syria has affected, and continues to affect these foreign investments within the State; potentially damaging or destroying their operability or worth. In November 2011, the Syrian government allegedly halted payment of Shell for their services in extracting and producing oil from their Syrian assets[107]. The decision to halt payments was taken in the midst of a declining Syrian economy, caused largely by the armed conflict engulfing the State, the Syrian government's increased defence spending, and decreased oil exports resulting from EU sanctions[108]. In December 2011, Shell ceased its operations in Syria following the imposition by the EU of sanctions[109] against its Syrian State-run corporate partner; Al Furat Petroleum[110]. Gulfsands also suspended their Syria operations in December 2011, declaring *force majeure* in respect of their contract with Syria, as a result of the imposition of EU sanctions against their Syrian partners[111]. Gulfsands however, continues to maintain their "Block 26" oil reserve facility as a corporate asset[112]. Suncor also declared *force majeure* in respect of their contract with Syria[113], yet still maintains its Ebla gas facilities as an asset[114].

A number of oil facilities, many of which were either owned or jointly operated by foreign investors, have fallen under the control of the insurrectionist movements operating within Syria. The al Omar and Tarnak oilfields, in which foreign corporations such as Shell

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[106] Jan Willem van Gelder & Anna von Ojik, 'Investments of European companies in Syria', Profundo, 13 May 2011, p. 12

[107] Javier Blas & Sylvia Pfeifer, 'Syria stops payments to Shell and Total' (*Financial Times*, 10 November 2011) <http://www.ft.com/intl/cms/s/0/118eec00-0bb7-11e1-9310-00144feabdc0.html#axzz3fyKLne4N> accessed 12 July

[108] Council Decision 2011/273/CFSP of 9 May 2011 concerning restrictive measures against Syria [2011] OJ L 121/11

[109] Council Decision 2011/782/CFSP of 1 December 2011 concerning restrictive measures against Syria and repealing Decision 2011/273/CFSP [2011] OJ L 319/56, Annex 1

[110] Guy Chazan, 'Sanctions Push Shell to Depart Syrian Oil Fields' (*Wall Street Journal*, 3 December 2011) <http://www.wsj.com/articles/SB10001424052970204826704577073901845419984> accessed 12 July 2015

[111] Supra note 109

[112] Gulfsands Petroleum, 'Corporate Update' (*Gulfsands Petroleum*, 20 March 2015) <http://www.gulfsands.com/s/NewsReleases.asp?ReportID=700948&utm_source=feedly&utm_medium=webfeeds> accessed 12 July 2015

[113] Suncor, 'Suncor Energy announces withdrawal from Syria' (*Suncor*, 11 December 2011) <http://www.suncor.com/en/newsroom/5441.aspx?id=1530463> accessed 12 July 2015

[114] Supra note 105

previously operated significant oil facility assets[115], were captured by ISIS in July 2014[116]. The al Omar field in particular had been controlled by a succession of insurrectionist movements since the genesis of the Syrian conflict, with the al Nusra Front and ISIS being amongst those groups[117], while other oil fields in Eastern Syria, formally operated by Shell, have also fallen into ISIS control[118]. In similar fashion, India's ONGC Videsh lost control of its oil fields and facilities to insurrectionist forces in April 2013[119]. Many of these facilities have been damaged, destroyed or looted at the hands of ISIS and other insurrectionist groups following their capture[120]. Further damage to the energy and resource extraction industry in Syria has been caused by the intervention of international armed forces in the conflict. In particular, the USA has undertaken numerous air strikes against ISIS targets within Syria, including those oil fields and facilities presently controlled by the insurrectionist group[121], and in May 2015, engaged in land-based combat with ISIS forces within the vicinity of the al Omar oil field[122]. Additionally, the town in which an unidentified German company had been reportedly developing a waste water treatment plant; Kanaker[123], has also come under fire. During the genesis stage of the conflict, in July 2011, the town came under attack by Syrian government forces[124].

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[115] David Butter, 'Hitting Islamic State's oil operations' (*BBC News*, 25 September 2014) <http://www.bbc.com/news/world-middle-east-29362252> accessed 12 July 2015

[116] Sylvia Westall, 'Islamic State seizes oil field and towns in Syria's east' (*Reuters*, 3 July 2014) <http://www.reuters.com/article/2014/07/03/us-syria-crisis-islamicState-idUSKBN0F80SO20140703> accessed 12 July 2015

[117] Al Jazeera, 'Islamic State 'seizes main Syria oil fields'' (*Al Jazeera*, 4 July 2014) <http://www.aljazeera.com/news/middleeast/2014/07/islamic-State-seizes-main-syria-oil-fields-20147411112027791.html> accessed 12 July 2015

[118] Benoit Faucon & Ayla Albayrak, 'Islamic State Funds Push Into Syria and Iraq With Labyrinthine Oil-Smuggling Operation' (*Wall Street Journal*, accessed 16 September 2014) < http://www.wsj.com/articles/islamic-State-funds-push-into-syria-and-iraq-with-labyrinthine-oil-smuggling-operation-1410826325> accessed 12 July 2015

[119] Kabir Taneja, 'India abandons Syrian oil fields' (*The Sunday Guardian*, 27 April 2013) <http://www.sunday-guardian.com/business/india-abandons-syrian-oil-fields> accessed 12 July 2015

[120] Suleiman Al-Khalidi, 'Here's How ISIS Uses Oil To Fuel Its Advances' (*Business Insider*, 18 September 2014) < http://www.businessinsider.com/r-how-islamic-State-uses-syrias-oil-to-fuel-its-advances-2014-9?IR=T> accessed 12 July 2015

[121] Peter Walker & Kim Willsher, 'US air strikes target Islamic State oil infrastructure' (*The Guardian*, 25 September 2014) <http://www.theguardian.com/world/2014/sep/25/us-air-strikes-islamic-State-oil-isis> accessed 12 July 2015; Reuters, 'Refinery in Syria Is Target of Airstrike' (*The New York Times*, 8 March 2015) < http://www.nytimes.com/2015/03/09/world/middleeast/refinery-in-syria-is-target-of-airstrike.html?_r=1> accessed 12 July 2015

[122] Barbara Starr, Laura Smith-Spark & Ray Sanchez, 'Abu Sayyaf, key ISIS figure in Syria, killed in U.S. raid' (*CNN*, 17 May 2015) <http://edition.cnn.com/2015/05/16/middleeast/syria-isis-us-raid/> accessed 12 July 2015

[123] Supra note 106

[124] BBC News, 'Syria forces kill eight in Kanaker raid – rights groups' (*BBC News*, 27 July 2011) <http://www.bbc.com/news/world-middle-east-14305762> accessed 12 July 2015

5.3 Libyan and Syrian treaty obligations

5.3.1 Libyan treaty obligations

Libya is a State party to BITs which are in force with twenty States, and holds a further eighteen which have been signed, but are not yet in force[125]. In particular, Libya is a party to BITs with Austria[126], Italy[127], Germany[128] and Spain[129]. The Austria-Libya BIT outlines that investors covered by its provisions include enterprises constituted or organised under Austrian law[130]. Therefore, OMV, which is constituted under Austrian law[131], is considered an investor as per the terms of the BIT, and will be granted the protections provided for within the BIT. The Italy-Libya BIT outlines that investors covered by its provisions include legal persons who have their main office on Italian territory[132]. Eni, which possesses its main office in Rome[133], thus constitutes an investor, and will receive the protections provided for in the BIT. The Germany-Libya BIT outlines that investors covered by its provisions include legal entities, including corporations, which have their seat in Germany[134]. Wintershall's seat of business is located in Kassel[135], and is therefore considered an investor capable of receiving the protections provided in the BIT. Finally, the Spain-Libya BIT States that an investor includes any entity incorporated under Spanish law, and with its registered office in Spanish territory[136]. Repsol is incorporated under Spanish law, and has its registered office in Madrid[137], thus it is to be considered an investor able to benefit from the protections offered by the BIT.

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[125] Investment Policy Hub, 'Libya' (*United Nations Conference on Trade and Development*) <http://investmentpolicyhub.unctad.org/IIA/StateBits/119> accessed 12 July 2015

[126] Supra note 58

[127] Accordo tra la Republica italiana e la grande Jamahiriya araba libica popolare socialista sulla promozione e protezione degli investimenti (Italy-Libya) (adopted 13 December 2000, entered into force 20 October 2004)

[128] Agreement between the Federal Republic of Germany and the Socialist People's Libyan Arab Jamahiriya concerning the Encouragement and Reciprocal Protection of Investments (Germany-Libya) (adopted 15 October 2004, entered into force 14 July 2010)

[129] Acuerdo entre el Reino de Espana y la Gran Jamahiriya Arabe Libia Popular Socialista para la promocion y proteccion reciproca de inversiones (Spain-Libya) (adopted 17 December 2007, entered into force 1 August 2009)

[130] Supra note 58, Article 1 (1) (b)

[131] The Wall Street Journal, 'OMV AG' (*The Wall Street Journal*) <http://quotes.wsj.com/AT/OMV/company-people> accessed 12 July 2015

[132] Supra note 127, Article 3

[133] The Wall Street Journal, 'ENI S.p.A' (*The Wall Street Journal*) <http://quotes.wsj.com/IT/MTAA/ENI> accessed 12 July 2015

[134] Supra note 128, Article 1 (3) (b)

[135] Wintershall, 'Shaping the future' (*Wintershall*) <http://www.wintershall.com/en/company.html> accessed 12 July 2015

[136] Supra note 129, Article 1 (2) (b)

[137] The Wall Street Journal, 'Repsol S.A.' (*The Wall Street Journal*) <http://quotes.wsj.com/ES/XMCE/REP> accessed 12 July 2015

5.3.2 Syrian treaty obligations

Syria holds BITs with thirty-four States, and holds a further ten which have been signed, but are not yet in force[138]. In particular, Syria holds BITs with China[139], India[140] and Germany[141]. The China-Syria BIT provides that investors covered by its provisions include juridical persons or other economic entities established in accordance with the laws and regulations of China, and domiciled in Chinese territory[142]. Emerald Energy, as a subsidiary of Chinese State run company Sinochem, is both incorporated and domiciled in China[143], therefore Emerald Energy is considered an investor, and will be granted the protections provided for in the BIT. The India-Syria BIT outlines that investors covered by its provisions include corporations incorporated or constituted under Indian law[144]. Therefore, as ONGC Videsh is incorporated under Indian law[145], it is categorised as an investor and will benefit from the protections provided within the BIT. Finally, the German-Syria BIT states that investing companies include any commercial or other company having its seat within Germany and lawfully existing consistent with German law[146]. Therefore, for the unknown 'German' water treatment company to receive access to the protections provided within the BIT, it must exist under German law and have its seat of business in German territory.

The extent to which the obligations provided for in these BITs will remain applicable throughout the Libyan and Syrian armed conflicts is pertinent. This is especially true for those corporations (who, as foreign investors in Libya in Syria) may wish to engage these BIT obligations to obtain compensation or damages for adverse affects to their investments caused by the respective armed conflicts.

The ILC Effects Articles shall apply to any treaties entered into by either Libya or Syria as State parties to an armed conflict, in addition to any treaty relations Libya or Syria hold with

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[138] Investment Policy Hub, 'Syrian Arab Republic (*United Nations Conference on Trade and Development*) <http://investmentpolicyhub.unctad.org/IIA/StateBits/204#iiaInnerMenu> accessed 12 July 2015

[139] Agreement between the Government of the People's Republic of China and the Government of the Syrian Arab Republic concerning the Reciprocal Promotion and Protection of Investments (China-Syria) (adopted 9 December 1996, entered into force 1 November 2001) 1140 MOFCOM 1152

[140] Supra note 59

[141] Agreement between the Federal Republic of Germany and the Syrian Arab Republic concerning the Encouragement and Reciprocal Protection of Investments (Germany-Syria) (adopted 2 August 1977, entered into force 20 April 1980)

[142] Supra note 139, Article 1 (2) (b)

[143] Sinochem, 'About Us' (*Sinochem*) <http://english.sinochem.com/g704.aspx> accessed 12 July 2015

[144] Supra note 59, Article 1 (2)

[145] ONGC Videsh, 'About ONGC Videsh' (*ONGV Videsh*)<http://www.ongcvidesh.com/company/about-ovl/> accessed 12 July 2015

[146] Supra note 141, Article 1 (4) (a)

third States[147]. Such third party treaties may include (as discussed in Chapter 4) BITs. As provided by Article 3 of the ILC Effects Articles, the existence of an armed conflict in Libya and Syria (both non-international and international) will not *ipso facto* terminate the operations of these treaties between themselves and other States[148]. In this case, given the treaties are BITs (and thus may be considered 'agreements concerning private rights'), there is an implication they intend to continue their operation despite the existence of the armed conflict[149].

According to the ILC Effects Articles, where the BITs to which Libya and Syria are State parties contain express provisions on their operation in times of armed conflict, then these provisions shall apply[150]. Thus, the provisions outlining an obligation to provide treatment no less favourable than that which Libya and Syria accord to their own investors or those of third States during times of armed conflict (known as 'war clauses') shall continue to apply. Such clauses are contained within Libya's BITs with Austria[151], Germany[152], Italy[153] and Spain[154], and also in Syria's BITs with China[155], India[156] and Germany[157]. Rights and obligations regarding settlement of investment disputes will also continue their operation in Libyan and Syrian BITs despite the existence of armed conflict[158]. In particular, those provisions obliging Libya, Syria, and their partner States (including Austria[159], Germany[160], Italy[161] and Spain[162]; and China[163], India[164] and Germany[165] respectively) to engage in consultation, or to submit a dispute to arbitration, will maintain their applicability throughout the period of armed conflict.

[147] Supra note 69, Article 2, para. 5
[148] Supra note 10, Article 3
[149] Supra note 147
[150] Supra note 10, Article 4
[151] Supra note 58, Article 5 (1)
[152] Supra note 128, Article 4 (3)
[153] Supra note 127, Article 4 (1)
[154] Supra note 129, Article 6 (1)
[155] Supra note 139, Article 5
[156] Supra note 59, Article 6
[157] Supra note 141, Article 4 (3)
[158] Supra note 10, Article 9 (5)
[159] Supra note 58, Article 11
[160] Supra note 128, Article 10
[161] Supra note 127, Article 8
[162] Supra note 129, Article 11
[163] Supra note 139, Article 8
[164] Supra note 59, Article 9
[165] Supra note 141, Article 9

Article 61 of the ILC Effects Articles provides that Libya or Syria may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from their BITs where the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty[166]. Thus, should an investor remove their investment from either Libya or Syria, this may potentially form a basis for impossibility of treaty performance. However, no such argument will arise for Libya or Syria regarding their BITs where as a result of a breach of an obligation contained within their BITs the impossibility to perform arises[167]. Thus, where Libya or Syria have failed to provide adequate security and protection (as provided in Libya's BITs with Austria[168], Germany[169], Italy[170] and Spain[171]; and Syria's BITs with China[172], India[173] and Germany[174]) and this results in the destruction or removal of a foreign investment within their State, then impossibility of performance may not be engaged to terminate or withdraw from their respective BITs.

Article 62 of the ILC Effects Articles provides that a fundamental change of circumstances, not foreseen by the State parties, may only be invoked to terminate or withdraw from a treaty where the existence of those circumstances constituted an essential basis of consent to the treaty, and the change radically transforms the extent of the treaty's obligations[175]. Given that the Libyan and Syrian BITs appear to anticipate the possibility of armed conflict (evidenced via the use of 'war clauses'), it seems unlikely that either Libya or Syria could argue that the development of an armed conflict radically transforms their obligations under their respective BITs. The war clauses within both the Libyan and Syrian BITs act to provide specific obligations upon both States in times of armed conflict. Thus, the existence of armed conflict does not radically transform their BIT obligations; instead, armed conflict acts to engage an obligation which pre-exists the period of armed conflict.

Libya and Syria may expressly terminate or withdraw from their BITs in situations of armed conflict. However, such an intention to terminate or withdraw must be notified to the other State parties (for example, regarding Libya; Austria, Germany, Italy and Spain, and regarding

[166] Supra note 10, Article 61
[167] Supra note 10, Article 61 (2)
[168] Supra note 58, Article 3 (1)
[169] Supra note 128, Article 4 (1)
[170] Supra note 127, Article 2 (3)
[171] Supra note 129, Article 3 (1)
[172] Supra note 139, Article 3
[173] Supra note 59, Article 3 (2)
[174] Supra note 141, Article 4 (1)
[175] Supra note 10, Article 62

Syria; China, India and Germany), or the treaty's depositary[176]. Such notification will take effect upon receipt of that notification by the other State party[177], and State parties to the BIT will be granted as much time as is reasonable to object to the BITs termination or withdrawal[178].

In any case, should Libya's and Syria's BITs be terminated, withdrawn from or suspended in operation as a result of armed conflict, both States will maintain a duty to fulfil an obligation embodied in their BITs, which also exists under international law[179], including those contained within the Geneva Conventions[180]. Such obligations will be discussed further in Chapter 7.

[176] Supra note 10, Article 9 (1)
[177] Supra note 10, Article 9 (2)
[178] Supra note 10, Article 9 (3)
[179] Supra note 10, Article 10
[180] Supra note 12

6. Standards of protection provided in Libyan and Syrian treaties

6.1 Full Protection and Security

The majority of BITs contain what may be known as 'full protection and security' clauses. These clauses operate so as to oblige the treaty parties to provide security for, and protect, the investments of foreigners within their State. The application of these clauses has been interpreted and moulded via a number of arbitral tribunal decisions, many of which involve the onset of armed conflict or civil disturbance which has resulted in damage to foreign investment. In particular, arbitral jurisprudence has defined the scope of liability present in such obligations of protection and security, and has outlined the extent to which specific entities (including State-sponsored militia groups and non-State actors operating within an armed conflict scenario) may contribute to and alter the obligations provided by a BIT.

Libya holds an obligation to provide full protection and security to a number of third States via their BITs. In particular, Libya is obliged to provide full protection and security to Austria[181], Germany[182], Italy[183] and Spain[184]. Similarly, Syria is obliged within its relevant BITs to provide full protection and security to investments within its State from those investors from India[185] and protection to those from China[186] and Germany[187]. Thus, foreign investors in Libya (such as Italy's Eni, Spain's Repsol, Germany's Wintershall, and Austria's OMV) and in Syria (such as India's ONGC Videsh, China's Emerald Energy and Germany's unidentified water treatment company) may potentially rely on these clauses to claim compensation or damages for adverse effects to their investments resulting from the existence of armed conflict in their investment's host State.

6.1.1 Protection and security obligations of State organs

The obligation provided in these BITs to provide protection and security has been held to not create an absolute liability. This was provided for in the *ELSI* case of the ICJ, where it was held that the correct standard when analysing an obligation to provide protection and security

[181] Supra note 58, Article 3
[182] Supra note 128, Article 4
[183] Supra note 127, Article 2 (3)
[184] Supra note 129, Article 3 (1)
[185] Supra note 59, Article 3 (2)
[186] Supra note 139, Article 3
[187] Supra note 141, Article 4 (1)

was not absolute liability, but instead one of due diligence, where the State must be seen to have acted within the bounds of its capabilities to protect and secure investments[188].

The finding in *ELSI* has been followed by a number of other arbitral proceedings dealing with the obligation to protect and secure foreign investment. This may be evidenced via the decision of *Asian Agricultural Products Ltd. v Republic of Sri Lanka* (*AAPL*), in which the tribunal rejected the claimant's argument that a provision contained within a BIT between the UK and Sri Lanka (granting full protection and security) created a strict or absolute liability for Sri Lanka, thus guaranteeing to the UK that no damages would be suffered by its investors within Sri Lanka[189]. Instead, the tribunal in *AAPL* held that what must be applicable in such a case is a standard of "due diligence" to be administered by Sri Lanka (as an investment host State) towards foreign investments[190]. Similarly, in *Wena Hotels Limited v Egypt* (*Wena Hotels*), the tribunal found that an obligation to protect and secure a foreign investment (as was provided within a BIT between the UK and Egypt) did not create an absolute obligation guaranteeing a total lack of sufferable damages[191]. The BIT did however create an obligation for Egypt to take action as necessary and within its capabilities to protect and secure the investment[192]. Alternatively, in *Toto Construzioni Generali S.P.A v Republic of Lebanon* (*Toto*), the tribunal held that the respondent, Lebanon, did not breach its obligations to protect the claimant's investment, provided within its BIT with Italy[193]. The tribunal in *Toto* held Lebanon did "whatever was within its power" to ensure the investment was protected, which in this instance involved requesting Syrian armed forces (which had positioned themselves in the vicinity of the foreign investment) to evacuate from the site of the investment[194].

The obligation of protection and security must therefore be considered a requirement to act with due diligence in the protection of foreign investment. Thus, a host State for foreign investment (such as Libya or Syria) must be diligent in restraining its use of armed force where an investment protected by such an obligation contained within a BIT is involved or

[188] *Eletronica Sicula S.p.A. (ELSI) (United States of America v Italy)* (Merits) [1989] ICJ Rep 15, para. 108
[189] *Asian Agricultural Products Ltd. (AAPL) v Republic of Sri Lanka,* Award, ICSID Case No ARB/87/3, 27 June 1990, para. 48
[190] *Ibid*, para. 50
[191] *Wena Hotels Limited v Arab Republic of Egypt*, Award, ICSID Case No ARB/98/4, 8 December 2000, para. 84
[192] *Ibid*, para. 85
[193] *Toto Construzione Generali S.P.A v Republic of Lebanon,* Award, ICSID Case No ARB/07/12, 7 June 2012, para. 197
[194] *Ibid*, para. 199

present[195]. Additionally, host States must act diligently to protect and secure the foreign investment against attack or damage from insurrectionist or other private forces acting within the host State. Such an obligation however will only exist for the host State to the extent of the reasonable use of its own protection and security capabilities[196].

6.1.2 Protection and security liabilities of Libyan and Syrian State organs

In light of this, Libya and Syria (in line with their obligations to provide protection and security to investors from the States of Austria, Italy, Germany and Spain, and China, India and Germany respectively) will be required to exercise a degree of due diligence towards the protection and security of foreign investments in their position as investment host States. Libya and Syria will likely only face damages or compensation penalties where they fail to act with due diligence, and this failure to act results in damages or other adverse affects to foreign investments. Neither Libya nor Syria will be held liable for all damages caused by their respective armed conflicts. On the contrary, they will likely be held liable only for those damages which they could have prevented via the implementation of due diligence and the reasonable use of their own protective and security capabilities.

6.1.2.1 Libyan government liabilities

As per Article 10 of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles of State Responsibility), Libya will be held liable for acts committed by the controlling government prior to the insurrectionist movement[197]. Theoretically, present-day Libya may also be held liable for the actions of the successful insurrectionist movement, where it is found to form the current government[198]. It is unlikely that this will be the case however, as there must exist "[...] real and substantial continuity between the former insurrectional movement and the new Government it has succeeded in forming"[199]. In Libya's case, the successful insurrectional movement succeeded in forming the National Transitional Council[200]. The two entities currently competing for governance of Libya; the General National Congress and the Council of Deputies cannot be said to hold

[195] Christoph Schreuer, 'The Protection of Investments in Armed Conflicts' [2012] TDM 3, p. 9
[196] *Ibid*
[197] Supra note 9, p. 45, Article 10 (3)
[198] Supra note 9, p. 45, Article 10 (1)
[199] UNGA 'Report of the International Law Commission', Commentary, (23 April 2001) UN Doc A/56/10, p. 51, Article 10
[200] David Gritten, 'Key figures in Libya's insurrectionist council' (*BBC News*, 25 August 2011) <http://www.bbc.com/news/world-africa-12698562> accessed 15 August 2015

continuity with the insurrection, given that both entities were elected to power following the imposition of the National Transitional Council[201], and did not gain authority by simply being the successful insurrectional movement.

6.1.2.1.1 Liabilities arising from previous government actions

According to its protection and security obligations contained in its BITs with Austria[202], Italy[203], Spain[204] and Germany[205], Libya may be held liable for damages arising from the withdrawal from its State of investments by the likes of Eni, Wintershall, OMV and Repsol. Such withdrawals, which occurred during the initial phase of the armed conflict in 2011 and under the rein of the pre-insurrectionist government, included oil facility and production shutdowns[206], in addition to staff removal[207]. Libya may be held liable for any financial damages arising from these withdrawals where it can be shown that, as the investment host State, it failed to operate with due diligence in ensuring the investments' protection and security, and this resulted in the withdrawal of the investments. Simply because the investments were withdrawn (and thus potentially suffered loss or damage) due to the armed conflict occurring in Libya will not in itself position Libya as liable. Instead, Libya must be shown to have failed to act within its capabilities and with due diligence to provide protection and security to the investments, causing them to be withdrawn. This may involve, for example, a finding that Libya failed to protect and secure particular oil facilities or staff members, despite requests for assistance from the foreign investors to do so, and despite Libya readily possessing the means and capability to provide this protection and security.

Libya may also be held liable for damages arising from the actions of its pre-insurrectionist government towards the Brega oil facility, which was severely damaged in a series of battles throughout 2011[208], or towards the oil facilities in Ras Lanuf in September 2011[209]. In this instance, the foreign investor present at such sites, Italy's Eni[210], may bring a claim under Libya's protection obligations contained in its BIT with Italy. Eni, as claimant, may argue that

[201] Alison Pargeter, 'Why elections won't save Libya' (*Al Jazeera America*, 4 July 2014) <http://america.aljazeera.com/opinions/2014/7/libya-council-ofdeputieselectionsislamistssecuritybenghazi.html> accessed 16 August 2015
[202] Supra note 58, Article 3
[203] Supra note 127, Article 2 (3)
[204] Supra note 129, Article 3 (1)
[205] Supra note 128, Article 4
[206] Supra note 80
[207] Supra note 82
[208] Supra note 84
[209] Supra note 90
[210] Supra note 86

Libya failed to act with due diligence in diverting the focus of the armed conflict away from the oil facilities housing its foreign investments, and which were damaged as a result of the armed conflict.

6.1.2.1.2 Liabilities arising from current government(s) actions

The successful insurrectionist government of contemporary Libya may also be held liable for its own actions, not just that of the previous regime. In particular, Libya may be held liable for a potential failure to exercise due diligence in preventing various militia groups from seizing oil ports and facilities throughout the State following the completion of their successful insurrection. Damages and compensation could be rendered payable for a breach of protection and security obligations regarding, for example, the shutdown of a number of oil fields and facilities following armed attacks by ISIS in March 2015[211], where these attacks and subsequent shutdowns result in damage to foreign investment. It seems unlikely however that the current Libyan government could be held to have the requisite capabilities to effectively repel such attacks on these oil facilities and potential foreign investments. Given the fractured nature of the current Libyan government, it is arguable that the State simply does not have the ability to prevent such attacks, seeing as the State's resources are, effectively, divided between four rival groups[212] which are competing for overall control of Libya. Such a finding would recognise that Libya possesses a low threshold of "due diligence" regarding its protection and security obligations outlined within its BITs, and thus may not currently be held liable for any alleged breaches of these obligations.

6.1.2.1.3 Liabilities arising from militia groups supported by the Libyan government(s)

As provided by the ILC Articles of State Responsibility, the State will be responsible for private action if it adopts and acknowledges the conduct by the private actors as its own[213]. This position has been consistently supported through arbitral jurisprudence. In *Biwater Gauff (Tanzania) Ltd. v The United Republic of Tanzania* (*Biwater Gauff*), the tribunal held that the protection and security standard as provided in the BIT between the UK and Tanzania extended to actions by organs and representatives of the State of Tanzania itself[214]. The

[211] Supra note 96
[212] Namely, the Council of Deputies (Supra note 34), the General National Congress (Supra note 34), Ansar al-Sharia (Supra note 36) and ISIS (Supra note 37)
[213] Supra note 9, Article 11
[214] *Biwater Gauff (Tanzania) Ltd. v The United Republic of Tanzania,* Award, ICSID Case No ARB/05/22, 24 July 2008, para. 730

tribunal in *American Manufacturing & Trading, Inc. v Republic of Zaire* (*AMT)* held that looting and damages carried out by elements of the Zairian armed forces against the claimant's foreign investment[215] rendered the State liable. As Zaire did not exercise the requisite vigilance in preventing such looting and damages[216], the tribunal found the State should be held liable as per its protection and security obligations contained within its BIT with the USA[217].

Libya may thus be held liable for damages to foreign investments resulting from the actions of private militia movements which acted in support of the State's previous government. In particular, militia groups supporting the now-deposed and deceased Libyan leader, Muammar Gaddafi, were active in defending and attacking a number of oil facilities throughout 2011[218], potentially damaging or causing losses to foreign investment in that industry. Libya may also be held liable for the actions of private militia groups operating in support of the various "competing" governments of current-day Libya. In particular, the potential government of the General National Congress may be held liable where actions by its supporting militia groups (including Libya Dawn[219] and Ansar Al-Sharia[220]) have resulted in damage or losses to foreign investment.

Where it can be shown these private groups acted and incurred damage with the acquiescence of the ruling government, then as per Article 11 of the ILC Articles on State Responsibility[221], Libya may be held liable. Claimants must then identify the extent to which the Libyan State has failed to act with due diligence in preventing damage from occurring at the hands of these private actors. Given these armed groups effectively received consent (and support) from the Libyan State (in the case of those militia groups operating in 2011: from Muammar Gaddafi, and in the case of Libya Dawn and Ansar al-Sharia: from the General National Congress), it would appear that their actions, by natural extension, also received State consent. Therefore, it is arguable that the actions of the likes of Gaddafi's loyalist militia, Libya Dawn and Ansar al-Sharia (including attacks against oil facilities which may have housed foreign investment)

[215] *American Manufacturing & Trading, Inc. v Republic of Zaire,* Award, ICSID Case No ARB/93/1, 21 February 1997, para. 3.04
[216] *Ibid*
[217] *Ibid*, para. 6.04
[218] Leila Fadel, Liz Sly & Steve Hendrix, 'Insurrectionists repel Gaddafi loyalists in battle for key Libyan oil port' (*The Washington Post*, 1 March 2011) <https://www.washingtonpost.com/world/as-gaddafi-holds-on-some-libyans-seek-foreign-intervention/2011/03/01/ABBDXeL_story.html> accessed 5 August 2015
[219] Supra note 34
[220] Supra note 36
[221] Supra note 9, p. 45, Article 11

would have been acquiesced to by the Libyan State by default. Should this be the case, it is likely that the Libyan State would be held liable for failing to demonstrate the required due diligence to absolve itself of its protection and security obligations contained within its various BITs. By effectively approving and supporting the potentially damaging acts of private militia, Libya has failed to act within its capabilities to prevent any action which may result in its protection and security obligations being breached.

6.1.2.2 Syrian government liabilities

As per its protection and security obligations outlined in its BITs with India[222], Germany[223] and China[224], Syria may be held liable for any damages and losses arising out of its armed conflict to investments made by foreign investors from those States. These investments include oil facilities operated by India's ONGC Videsh[225] and China's Emerald Energy[226], and a water treatment plant operated by an unidentified German company[227].

Syria may be held liable for failing to properly protect and secure ONGC Videsh's oil facilities, which in April 2013 fell into insurrectionist control, forcing the foreign investor to abandon its investment in Syria[228]. Such liability will only arise however, where it can be shown that Syria failed to act with due diligence in protecting and securing the investment. This would require that Syria did not act within its capabilities to properly protect and secure ONGC Videsh's oil facilities. Given that, at the time, the Syrian government had lost large swathes of its own territory to insurrectionist forces, and these oil facilities fell within this lost territory[229], it seems unlikely that Syria held the capability to protect the oil facilities from insurrectionist takeover. Without access to the territory itself, Syria arguably did not have the ability to act with due diligence to effectively protect and secure ONGC Videsh's investment. As was held in *Wena Hotels*, Syria will not be obligated to protect ONGC Videsh's investment from all potential damages and losses[230], only those which it can reasonably prevent within its capabilities[231]. Furthermore, should ONGC Videsh wish to hold Syria liable

[222] Supra note 59, Article 3 (2)
[223] Supra note 141, Article 4 (1)
[224] Supra note 139, Article 3
[225] Supra note 101
[226] Supra note 104
[227] Supra note 106
[228] Supra note 119
[229] *Ibid*
[230] Supra note 191
[231] Supra note 191, para. 85

as per protection obligations, it must definitively prove that Syria has in fact committed acts harming its investment. As was held in *AAPL;* where the claimant's evidence cannot be considered reliable, the responsibility of the State cannot be presumed[232]. Considering the lack of territorial control by Syria in the vicinity of the foreign investment, it is arguable whether ONGC Videsh, as claimant, would be able to produce reliable evidence highlighting Syria's harmful actions.

Syria may also be held liable for a breach of its investment protection obligations as per its BIT with Germany[233], should damage have occurred to the water treatment plant constructed in the town of Kanaker by an unidentified German company[234]. Should any potential damage have arisen from the operations of Syrian armed forces in the town of Kanaker in 2011 (in which residents aligned with the State's insurrectionist movement came under attack)[235], then it would appear likely that Syria will have breached its due diligence protective obligations. As Schreuer notes, what the due diligence concept requires is for Syria to "exercise restraint in the use of armed force where a protected investor is involved"[236]. Thus, where Syria has failed to exercise such restraint, for example by inadvertently firing upon or damaging the foreign-controlled water treatment plant in Kanaker, then it may be held liable under its protection obligations outlined in its BIT with Germany.

6.1.3 Protection and security obligations of States regarding non-State actors

As provided by the tribunal in *AAPL*, a State will maintain a duty of protection provided in a BIT towards a foreign investment, regardless of whether the damaging act originates from the State or from non-State actors[237]. Therefore, States must act with due diligence in preventing any potential damage resulting from the actions of not only their own organs and supported private actors, but also those non-State actors operating independently of the State within its territory. Such due diligence, it has been held, would require the State to undertake "all possible measures that could be reasonably expected to prevent the occurrence of [...] property destruction"[238]. This position has been confirmed through a series of arbitral

[232] Supra note 189, para. 85
[233] Supra note 141, Article 4 (1)
[234] Supra note 106
[235] Supra note 124
[236] Supra note 195
[237] Supra note 189, para. 72
[238] Supra note 189, para. 85

decisions, including by the Morocco Claims Tribunal, which held that a State may be responsible for failing to prevent damages resulting from the actions of non-State actors, provided they were capable of doing so[239].

6.1.3.1 Syria

Syria may thus be held liable for any damages obtained via the actions of the various non-State actors participating in its armed conflict. In particular, the State may be held liable for armed attacks carried out by groups including ISIS[240] on various oil facilities located throughout Syria, some of which may hold foreign investments. Therefore, Syria's obligations to protect and secure foreign investment include an obligation to act with due diligence in preventing the actions of these non-State entities from resulting in damages to foreign investment. Such due diligence may involve not only physically preventing the armed attacks and the potentially subsequent damage, but also ensuring those non-State entities are appropriately punished, and that the foreign investors who suffered such damages are provided with sufficient reparation[241]. As previously Stated however, it appears unlikely that Syria would be held liable for demonstrating a lack of due diligence in preventing any damage arising from a non-state actor to foreign investments, given Syria's lack of territorial control over large swathes of territory surrounding the oil facilities which may potentially house foreign investment.

6.1.3.2 Libya

Libya may also be potentially held liable for the actions of various non-State groups presently operating within its territory. In particular, Libya may be held liable for failing to act with due diligence in preventing attacks and possible damages by groups including ISIS, who, in similar fashion to its activities in Syria, has shown a propensity for targeting and capturing oil facilities[242].

Once again however, it seems unlikely that Libya will be deemed as having failed to act with due diligence, using its full available capabilities, to prevent any such damage attributable to non-State actors present within its territory. As Libya currently exists as a fractured State, its

[239] *Spanish Zone of Morocco Claims* (*Spain v United Kingdom*) [1925] 2 RIAA 615, p. 643
[240] Supra notes 116, 117
[241] *Fischbach and Friedericy Cases* (*Germany-Venezuela Mixed Claims Commission*) [1903] 10 RIAA 388, p. 397-8
[242] Supra note 96

resources have arguably been severely diminished, thus greatly decreasing its ability to counteract the threat posed by specific non-State groups, not only to foreign investment, but also to infrastructure and human life. This may be evidenced by the increasing power of non-State groups in Libya, such as ISIS, which has grown to control significant portions of Libyan territory[243].

6.1.4 Conclusion

The protection and security obligations contained within BITs are an important right granted to foreign investors in the case of armed conflict. While protection and security clauses do not create an absolute liability, they do provide for a standard of due diligence which a State must act with in protecting and securing foreign investments. This due diligence requirement has been supported in both the ICJ[244], and in arbitral tribunals including *AAPL*[245], *Wena Hotels*[246] and *Toto*[247].

The Libyan government may be held liable as per its protection and security obligations contained within its various BITs. Liability may arise for not only the actions of the current Libyan government, but also the Libyan government which existed prior to the successful insurrection in 2011. In particular, the current Libyan government may be liable for actions of the previous government against the Brega oil facility and its potentially damaging acts against foreign investors such as Eni[248].

In contrast, the present Libyan government should escape liability for its own actions, as given the fractured nature of its governance and subsequently reduced capability to protect and secure foreign investments; it arguably holds a lower threshold of due diligence to which it must adhere. Elements of contemporary Libyan government may still, however, be held liable for the actions of militia groups acting with their consent[249]. In particular, where the General National Congress is considered as the Libyan government, it may be held liable for its use of private militia forces including Libya Dawn[250] and Ansar Al-Sharia[251]. Arbitral

[243] Supra notes 115, 116, 117, 118
[244] Supra note 188
[245] Supra note 189
[246] Supra note 191
[247] Supra note 193
[248] Supra notes 84
[249] Supra note 9, p. 45, Article 11
[250] Supra note 34
[251] Supra note 36

tribunals have remained sympathetic to this form of liability arising under protection and security obligations contained in BITs, as evidenced by the findings of *Biwater Gauff*[252] and *AMT*[253].

Libya and Syria may also be held liable as per their protection and security obligations due to the actions of non-State entities operating on their territory[254]. Of particular relevance are the actions of groups such as ISIS, the al Nusra Front and other militia groups, which in both Libya and Syria have captured and damaged a number of oil facilities which may potentially house foreign investments[255]. However, for Libya and Syria to be held liable, potential claimants such as Eni, Repsol, OMV, Wintershall, Emerald Energy and ONGC Videsh must evidence a lack of due diligence on the part of Libya or Syria in dealing with these non-State threats.

6.2 War Clauses

A number of BITs contain provisions relating to the obligations and rights of parties which will arise in the case of specific circumstances. One such circumstance involves the onset of war or armed conflict, which according to some BITs, will deliver unique obligations and rights. This is epitomised via the existence of what may be termed 'war clauses' in certain BITs. These clauses act to designate a war or armed conflict situation as receiving special guarantees, considering the robust and tumultuous climate which inevitably follows the outbreak of hostilities, and the potentially damaging and adverse affects which armed conflict may have on investments. War clauses may be separated into two distinct types; 'non discrimination' war clauses, which act to ensure a universal application of rights and obligations to all interested parties, and 'extended' war clauses, which operate so as to provide for guaranteed compensation in particular instances.

6.2.1 Non discrimination war clauses

'Non discrimination' war clauses provide for national and most favoured nation treatment regarding measures such as restitution and compensation, which States may take following

[252] Supra note 214
[253] Supra note 215
[254] Supra note 189, para. 72
[255] Supra notes 93, 94, 95, 96, 97

the effects of armed conflict on particular foreign investments[256]. These clauses do not create actual rights or obligations for States to provide restitution and compensation to foreign investors affected by an armed conflict. Instead, their operation depends on those actions and measures taken by investment host States in relation to other foreign investors[257]. War clauses thus construct a 'base-level' of treatment for foreign investors when specific measures carried out by the State are compared with those directed towards other foreign and national investors. As the tribunal in *CMS Gas Transmission Company v The Argentine Republic* explained, when discussing the nature of the war clause provided in the BIT between the USA and Argentina; "[the] plain meaning of the article is to provide a floor treatment for the investor in the context of the measures adopted in respect of the losses suffered in the emergency, not different from that applied to nationals or other foreign investors"[258].

Non discrimination war clauses may be found in both Libyan and Syrian BITs. Libya holds non discrimination war clauses in its BITs with Austria[259], Germany[260], Italy[261] and Spain[262]. Syria holds such clauses in its BITs with Germany[263], India[264] and China[265]. It is worth noting however, that the China-Syria BIT provides for a slightly different mode of treatment in the case of armed conflict. While most non discrimination war clauses require treatment no less favourable than that accorded to the host State's nationals or other foreign investors, Article 5 of the China-Syria BIT obliges the investment host State to accord a foreign investor, who suffers loss due to war or insurrection, to be accorded fair and equitable treatment and the enjoyment of protection[266]. Such a difference is unlikely to prove troublesome however, given the fact that the fair and equitable standard acts as a flexible and independent protective principle in a number of BITs[267]. As such, the clause may operate as a 'catch all' device,

[256] Supra note 195, p. 9-10
[257] *Enron Corporation Ponderosa Assets, L.P v Argentine Republic,* Award, ICSID Case No ARB/01/3, 22 May 2007, para. 320
[258] *CMS Gas Transmission Company v The Argentina Republic,* Award, ICSID Case No ARB/01/8, 12 May 2005, para. 375
[259] Supra note 58, Article 5 (1)
[260] Supra note 128, Article 4 (3)
[261] Supra note 127, Article 4 (1)
[262] Supra note 129, Article 6 (1)
[263] Supra note 141, Article 4 (3)
[264] Supra note 59, Article 6
[265] Supra note 139, Article 5
[266] *Ibid*
[267] Stephen Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' [1999] 70 BYBIL 99, p. 100, 104, 145

theoretically including various other obligations, including those regarding non discriminatory treatment as compared to other foreign investors and host State nationals[268].

The operation of 'non discrimination' war clauses ensures that both Libya and Syria, should they compensate a foreign investor or national for damages to their investment resulting from their respective armed conflicts, then such compensation must be accorded to all other interested parties which hold such obligations with Libya or Syria. In practice, should Libya compensate the likes of Eni for damages to its oil facilities, or provide restitution to its State oil producer, NOC, then it must also provide compensation and restitution to other foreign investors, which via the operation of the relevant BITs hold a right to treatment no less favourable. Similarly, should some foreign investors in Syria, such as Emerald Energy, be compensated for damages arising from the armed conflict, then third party foreign investors such as ONGC Videsh must not receive compensation below the amount granted to Emerald Energy.

6.2.2 Extended War Clauses

'Extended' war clauses contain both the non discrimination terms and concepts described above, in addition to further obligations. These further obligations require that total or partial destruction or requisitioning of foreign investments by a host State's armed forces must be treated as expropriation, and therefore must receive compensation of the sort required in cases of expropriation[269]. Expropriation typically requires compensation by the investment host State to be prompt, adequate and effective[270].

'Extended' war clauses are not as widely used as their non discrimination counterpart. While Libya holds 'extended' war clauses in its BITs with Austria[271] and Spain[272], Syria's BITs with each of India, China and Germany do not contain any such clause. This is not to say however that Syrian BITs do not as a rule contain 'extended' war clauses, with the State's BITs with nations such as Azerbaijan[273] containing the clause. It is interesting to note that 'extended' war clauses provide for differing obligations when dealing with State measures constituting

[268] Supra note 2, p. 133
[269] Supra note 195, p. 11
[270] Supra note 2, p. 99
[271] Supra note 58, Article 5 (2)
[272] Supra note 129, Article 6 (2)
[273] Agreement between the Government of the Republic of Azerbaijan and the Government of the Syrian Arab Republic on the Promotion and Reciprocal Protection of Investments (Azerbaijan-Syria) (adopted 8 July 2009, entered into force 4 January 2010), Article 7 (2)

either requisitioning of foreign investment, or destruction of foreign investment. As provided in Libya's BITs with Austria[274] and Spain[275], where the foreign investment is requisitioned by the host State, compensation will be due to that investor regardless of whether such a measure was undertaken in view of military necessity. Conversely, where the foreign investment is destroyed or partially destroyed by the host State, compensation will be due only if the measures leading to the destruction exceeded the requirements of military necessity. Thus, destruction or damage of foreign investments resulting from action which is militarily necessary will not be covered under the provisions of Libya's BITs with Austria[276] or Spain[277].

6.2.2.1 Military necessity

Clearly, the concept of military necessity plays an integral role in the operation of 'extended' war clauses. Whether or not an action undertaken by the investment host State against a foreign investment qualifies as an action of military necessity will alter the potential compensation available to the foreign investor, as per the obligations provided in the relevant BIT.

The ICRC defines military necessity as a requirement to undertake actions for the purpose of weakening the military capacity of the other parties to the armed conflict[278]. Article 52 of Additional Protocol I to the Geneva Conventions supports this definition, insofar as it provides that: "[...] 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"[279]. Arguably, attacks on military objectives which result in their destruction must be characterised as actions of military necessity; their characterisation as military objectives justifies their potential targeting, as such targeting would be necessary to gain military advantage[280]. Proportionality plays a key role in a determination of military

[274] Supra note 58, Article 5 (2)
[275] Supra note 129, Article 6 (2)
[276] Supra note 58, Article 5 (2)
[277] Supra note 129, Article 6 (2)
[278] Marco Sassoli, Atoine A. Bouvier & Anne Quintin, 'How Does Law Protect in War?: Military necessity' (*International Committee of the Red Cross*, 5 June 2012) <https://www.icrc.org/casebook/doc/glossary/military-necessity-glossary.htm> accessed 7 August 2015
[279] Supra note 14, Article 52 (2)
[280] Nobuo Hayashi, 'Requirements of Military Necessity in International Humanitarian Law and International Criminal Law' [2010] 28 BUILJ 39, p. 114

necessity. In particular, acts undertaken by an investment host State which result in collateral damage to a foreign investment may only be deemed as militarily necessary where their effects are proportionate to the damage caused to the foreign investment[281]. Conversely, where the foreign investment's collateral destruction may be deemed disproportionate to the military advantage gained from an attack against a military objective, then the attack will not be deemed as one of military necessity[282].

6.2.2.2 Extended war clause liabilities of Libya

Libya may be held liable as per its 'extended' war clauses contained in its BITs with Austria[283] and Spain[284] where it is shown that the actions of its armed forces resulted in the destruction, partial destruction, or requisitioning of specific foreign investments, particularly those held by Austrian, Italian and Spanish companies OMV and Repsol. Such destruction or requisitioning must be evidenced by the claimants to have been undertaken by Libyan armed forces or authorities, and must be shown to have occurred sans military necessity.

6.2.2.2.1 Military objectives and military necessity: an analysis of the El Sharara oil field

Therefore, for a claimant to be successful in a claim for Libyan liability as per such the relevant 'extended' war clause, they must evidence two distinct factual circumstances. Firstly, the claimant must show that destruction or partial destruction of their investment is attributable to Libyan armed forces or authorities. Thus, should Libyan forces act to reclaim possession of the El Sharara field (which in November 2014 was at least partially captured by non-state actors[285]), any damage delivered to the foreign investments located there would have to be shown by claimants (for example, Spain's Repsol and Austria's OMV, which hold stakes in the field[286]) as attributable to actions of the Libyan authorities, as per Articles 5 (2)[287] and 6 (2)[288] of the Austria-Libya and Spain-Libya BITs, respectively.

Arbitral jurisprudence shows it is difficult however to prove that destruction or partial destruction was carried out by forces of the investment host State. In *AAPL*, the tribunal held

[281] *Prosecutor v Hadzihasanoviae & Kubura* (Trial Judgment) IT-01-47-T (15 March 2006), p. 45
[282] *Prosecutor v Martiae* (Trial Judgment) IT-95-11-T (12 June 2007), p. 394
[283] Supra note 58, Article 5 (2)
[284] Supra note 129, Article 6 (2)
[285] Supra note 94
[286] Supra note 84, p. 43
[287] Supra note 58, Article 5 (2)
[288] Supra note 129, Article 6 (2)

there to be no conclusive proof that the claimant's losses were incurred as a consequence of the acts of Sri Lankan forces (as the investment host State). The tribunal noted the heavy burden of proof which the claimant faced in definitively showing "that the governmental forces and not the insurrectionists caused the destruction"[289]. This finding is relevant insofar as any battle for control over the El Sharara field would involve both Libyan and insurrectionist forces. It is therefore likely that the difficulties faced by the *AAPL* claimants in clearly identifying who was responsible for the damage to their investment would also be encountered by the likes of Repsol and OMV in a potential arbitral hearing regarding the El Sharara field, given the vagaries and unpredictability of armed conflict generally.

Of further relevance is the finding by the tribunal in *AMT* that soldiers of the investment host State's armed forces, in damaging a foreign investment, acted individually, without organisation, and were not under orders from the State itself[290]. Given Libya is effectively divided between a number of competing 'governments', with each government possessing its own militia groups, it appears possible that a similar situation as that in *AMT* could arise following an attack resulting in damages against the El Sharara field. In particular, it may prove difficult for a claimant, such as Repsol or OMV, to clearly show that damage to their foreign investment resulted from the actions of those armed forces representing (and under orders from) the Libyan State, and not from the actions of (for example) private or 'proxy' militia groups, such as Libya Dawn[291] or Ansar Al Sharia[292], which support competing governmental powers.

Where the claimant can conclusively evidence Libya's culpability in delivering the potentially destructive damage to the oil field, it must then show that Libya's actions exceeded that which was required for military necessity. To determine whether the actions directed against the El Sharara oil field would constitute those of military necessity, the field must be characterised as a military objective. In this instance, it appears possible that a major oil field such as El Sharara could constitute a military objective; a successful defence or capture of which would deliver a military advantage to either Libyan authorities or to insurrectionists. Such potential military benefit may accrue thanks to the value and importance of oil in armed conflict, both

[289] Supra note 189, para. 58
[290] Supra note 215, para. 7.08
[291] Supra note 34
[292] Supra note 36

in terms of revenue, and increased energy access[293]. Once again however, arbitral jurisprudence points to the burden of proof regarding military necessity being on the claimant[294]. As such, foreign investors such as OMV and Repsol may face considerable difficulties in evidencing that Libya acted without militarily necessity, in addition to proving that Libyan actions resulted in the destruction or partial destruction of their investments.

6.2.2.2.2 Collateral damage to civilian objects: an analysis of the Zawiya oil terminal

Where a foreign investment cannot be characterised as a military objective (thus constituting a civilian object which has received collateral damage), the actions of the Libyan armed forces or authorities must not have been disproportionate to that required to complete a separate and distinct military objective. Damages obtained by the Zawiya oil terminal (a supply point for oil produced from fields controlled by Repsol and OMV[295]) as a result of Libyan forces[296], may potentially be characterised as such collateral damage. The oil terminal is located within the town of Zawiya, which given its strategic position as a port on the Gulf of Sidra, and its location on a major road between Tripoli and Tunisia, may be considered a military objective[297]. Therefore, damage obtained by the terminal may be characterised as collateral damage resulting from attacks against the port or town. Should this be the case, then potential claimants such as Repsol and OMV must show that acts used to obtain the military objective (the port or town of Zawiya) were disproportionate to the damage caused to their foreign investment (the Zawiya oil terminal).

To determine whether the acts were disproportionate, it is possible to analyse whether the town or port could have been successfully captured by Libyan government forces without inflicting damage upon the Zawiya oil terminal. Conversely, where a successful capture of the town or port was impossible without inflicting collateral damage against the terminal, it is likely that any collateral damage will be adjudged proportionate. In this instance, it is arguable that the actions of the Libyan government forces in inflicting collateral damage were proportionate to their military objective of capturing the Zawiya town or port. Government forces were trapped in the oil terminal, while insurrectionist forces held the surrounding

[293] Keith Krause, 'Armed Groups and Contemporary Conflicts: Challenging the Weberian State' (Routledge, 2013) p. 72
[294] Supra note 189, para. 58
[295] Supra note 94
[296] Supra note 88
[297] *Ibid*

areas[298]. Therefore, Libyan government forces acted proportionately insofar as they had no alternative course of action available to both defend their position inside the oil terminal, and to attack insurrectionist forces encamped in the surrounding areas.

6.2.3 Conclusion

'Non discrimination' war clauses are a common feature in BITs. In providing for a base level approach to compensation and damages, the clauses tend to act as specialised most favoured nation or national treatment provisions, focussed on damages resulting from armed conflict. Relatively straightforward in operation, these clauses offer foreign investors in Libya and Syria a guarantee that they will not be unfavourably treated where compensation is made available following damages resultant from the State's armed conflict.

While it is possible for potential claimants, such as OMV and Repsol, to use the 'extended' war clauses provided in Libya's BITs with both Austria and Spain to obtain damages or compensation, it remains a trying task. Arbitral jurisprudence shows that claimants face significant evidential hurdles in proving that conduct resulting in damage to a foreign investment was undertaken by a State's armed forces or authorities. Claimants may also face a difficult burden of proof in showing the conduct was not undertaken on grounds of military necessity, or that the damage obtained was disproportionate to the achievement of a distinct yet militarily necessary objective. Such difficulties in obtaining conclusive evidence to support 'extended' war clause claims perhaps indicates why the clauses are relatively uncommon in BITs, when compared with their counterpart 'non discrimination' war clauses.

[298] *Ibid*

7. Obligations to protect investment during armed conflict under the laws of armed conflict

Foreign investors based in States which do not hold BITs with Libya and Syria are clearly unable to take advantage of the rights and obligations (such as protection and security and war clauses) contained in those treaties. This does not, however, equate to a vacuum of investor protection for potential claimants such as Gulfsands, Shell and Suncor who hail from States (the UK, Netherlands and Canada respectively) not party to the relevant BITs, and yet who hold foreign investments in Libya and Syria. Alternative protection may be available to these foreign investors via the laws of either international or non-international armed conflict, depending on the specific circumstances of their investment. These laws form international obligations binding upon their signatory States, and where they are considered customary international law; upon all States. The ILC's Articles of State Responsibility provide that where an act of a State is not in conformity with what is required of it by a particular international obligation, the State commits an international wrong[299]. Further, where a State commits an international wrong, the State is deemed internationally responsible[300], with such responsibility giving rise to an obligation to compensate for the damage caused, including any loss of profits[301].

7.1 International Armed Conflict

The law of international armed conflict (LIAC) provides for a number of rights and obligations which, while geared towards the regulation of armed conflict of an international nature, may also form a valuable protective mechanism against damage to private property, including foreign investments. As portions of the armed conflict in Libya may be characterised as an international armed conflict, these protections are significant for those foreign investors in Libya who are unprotected by Libyan BITs[302]. The provisions also offer a further protection to foreign investors who, while covered by Libyan BITs, may wish to pursue liability claims against third party armed forces who potentially damaged their investments during the international stage of the armed conflict.

[299] Supra note 9, p. 46, Article 12
[300] Supra note 9, p. 43, Article 1
[301] Supra note 9, p. 52, Article 36
[302] Supra note 80

7.1.1 Losses caused by enemy States targeting investment host-State

The Libyan armed conflict transformed from a non-international to an international armed conflict following the passing of UNSC Resolution 1973[303]. The Resolution led to the commencement of air strikes by NATO forces including the USA and France against Libyan targets[304]. As a result of these air strikes, areas which potentially housed foreign investments (particularly those involving oil and gas facilities) came under either direct or indirect attack. The Brega oil facility, for example, came under fire and allegedly received damage as a result of air strikes by NATO forces[305]. Foreign investors with investments in Brega, such as Eni[306] and possibly Shell[307], may therefore turn to LIAC to hold third party States who were enemies of their investment host State (Libya) such as the USA and France, responsible for damage caused to their investments[308].

A number of conventions are relevant in this sense. The Hague Regulations, which are contained as an annex to the Fourth Hague Convention of 1907[309], provide for a number of rights and obligations applicable to international armed conflict. Article 46 of the Hague Regulations maintains that during an armed conflict, private property must be respected[310]. The Geneva Conventions also provide relevant protections. Article 53 of the Fourth Geneva Convention holds that unless rendered militarily necessary, destruction of property belonging to private persons is prohibited[311], while Article 52 of Additional Protocol I maintains that "Civilian objects shall not be the object of attack or of reprisals"[312]. Each of these provisions and their obligations are, according to the ICRC, to be considered customary international law[313]. Thus, their protections relating to respect for property, prohibition of pillage and destruction of property are binding on States that have not ratified the conventions in which they are contained. Where attacking States fail to comply with these obligations, then as per the Rome Statute of the International Criminal Court (ICC), a war crime may exist. Article 8

[303] Supra note 27
[304] Supra note 28
[305] Supra note 84
[306] Supra note 86
[307] Supra note 89
[308] Supra note 28
[309] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) 187 CTS 227
[310] *Ibid*, Regulations: Article 46
[311] 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, Article 53
[312] Supra note 14, Article 52
[313] Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Law* (Vol. 1, Cambridge, 2005), Rules 51, 52, 147

of the Rome Statute provides that war crimes consist of, *inter alia*, "violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely; [...] Intentionally launching an attack in the knowledge that such attack will cause incidental [...] damage to civilian objects"[314].

7.1.1.1 Hague Regulations, Article 46

The Hague Regulations, particularly Regulations Article 46 may be applied to the States of Italy[315] and the Netherlands[316]. Eni and Shell, as juridical persons and incorporated entities, may be deemed nationals of Italy[317] and the Netherlands[318] respectively. The Hague Regulations may also be applied to the actions of the USA[319] and France[320], who, amongst other NATO States, participated in air strikes against Libya and who thus may have been culpable in the damage assumed by the Brega oil and gas facilities. For this reason, both USA and France may be held liable under the provisions of the Hague Convention for their actions against Brega, and may potentially be held to have breached its provisions, particularly Regulations Article 46. The Article requires that as attacking States, both the USA and France must respect private property located within the target State of Libya. The concept of 'respect' of private property arguably includes a prohibition on unnecessary or unreasonable destruction of the asset. That such a prohibition on destruction exists within Article 46 was seemingly confirmed by the ICJ in its Advisory Opinion of *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, where it held that particular types of property destruction may contravene the Article[321]. Therefore, depending on the specific circumstances of the attack by NATO forces (potentially involving the USA and

[314] Supra note 20, Article 8 (2) (b) (iv)
[315] Italy is not a signatory to the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, however as it forms part of customary international law (Supra note 313) it may be deemed bound
[316] The Netherlands signed Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land on 18 October 1907 and ratified on 27 November 1909. See International Committee of the Red Cross, 'Treaties and States Parties to Such Treaties' <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=195> accessed 10 August 2015
[317] Supra note 133
[318] The Wall Street Journal, 'Royal Dutch Shell PLC ADR Cl A' (*The Wall Street Journal*), <http://quotes.wsj.com/RDSA> accessed 17 August 2015
[319] The United States of America signed Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land on 18 October 1907 and ratified on 27 November 1909. See *Ibid*
[320] France signed Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land on 18 October 1907 and ratified on 7 October 1910. See *Ibid*
[321] *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 <http://www.icj-cij.org/docket/files/131/1671.pdf> accessed 11 August 2015, para. 132

France) on Brega, including the extent of the damage and destruction caused to private property owned by Eni and Shell, there may exist a contravention of Article 46 of the Hague Regulations.

7.1.1.2 Fourth Geneva Convention, Article 53

The Fourth Geneva Convention, particularly Article 53, may also be applied to Italy[322] and the Netherlands[323], thus providing a relevant potential protection for Eni's and Shell's assets in Libya and within Brega specifically. The Convention has also been signed and ratified by the USA[324] and France[325], thus binding them to its obligations, including Article 53's prohibition on the destruction of private property unless militarily necessary. Therefore, the USA and France may contravene Article 53 where they are found to have destroyed Eni's and Shell's private assets via their airstrikes on Brega without there being any military necessity for their destruction. As discussed in Chapter 6.2.2.1, attacks on military objectives which result in their destruction must be characterised as actions of military necessity. The Brega facilities, in their capacity as oil and gas production areas and supply terminals, must be characterised as military objectives. As discussed earlier, oil and gas facilities have the potential to make an effective contribution to the military action of Libya (in line with Additional Protocol I's definition of 'military objective'[326]), through both revenue and availability of energy resources[327]. Additionally, should allegations that Libya was using the Brega facilities as storage grounds for weapons prove correct[328], this would add further weight to claims that their destruction would offer a military advantage to the USA and France, and would thus constitute destruction in lieu of military necessity.

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[322] Italy signed 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War on 8 December 1949, and ratified on 17 December 1951. See International Committee of the Red Cross, 'Treaties and States Parties to Such Treaties' (*International Committee of the Red Cross*) <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=380> accessed 11 August 2015

[323] The Netherlands signed 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War on 8 December 1949 and ratified on 3 August 1954. See *Ibid*

[324] The United States of America signed 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War on 12 August 1949 and ratified on 2 August 1955. See *Ibid*

[325] France signed 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War on 8 December 1949 and ratified on 28 June 1951. See *Ibid*

[326] Supra note 14, Article 52 (2)

[327] Supra note 293

[328] Supra note 84

7.1.1.3 Additional Protocol I, Articles 52 and 48

Articles 52 and 48 of Additional Protocol I to the Geneva Conventions may be applied to Italy[329] and the Netherlands[330] as signatories. Therefore, both Eni and Shell may be able to access Articles 52's protection against civilian objects becoming objects of attack[331], and Article 48's directive that parties to an armed conflict shall only direct their operations against military objectives[332]. Both France and the USA, as attacking States, are obliged to adhere to Article 52; while only France is a signatory to Additional Protocol I[333], the provision constitutes customary international law, and as such should be additionally binding upon actions of the USA[334]. Similar to Article 53 of the Fourth Geneva Convention however, Eni's and Shell's interests in their Brega facilities will only be protected from the actions of France and the USA where the facilities can be characterised as civilian objects; defined by Article 52 as those objects which are not military objectives[335]. As discussed in Chapter 7.1.1.2, it appears likely that the Brega facilities (insofar as they served as an important revenue and resource point[336], and were allegedly used by Libya as a weapons cache[337]) should be categorised as military objectives. Thus, foreign investors such as Eni and Shell will not be able to implement Article 53's prohibition on destruction of civilian objects as a defence against American and French actions as attacking States targeting Brega.

7.1.2 Losses caused by enemy States occupying host-State

At no stage did NATO or other foreign forces formally occupy Libyan territory during the international armed conflict. While there were unconfirmed reports of the use of Special

[329] Italy signed 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) on 12 December 1977 and ratified on 27 February 1986. See International Committee of the Red Cross, 'Treaties and States Parties to Such Treaties' (*International Committee of the Red Cross*) <https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470> accessed 11 August 2015

[330] Netherlands signed 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) on 12 December 1977 and ratified on 26 June 1987. See *Ibid*

[331] Supra note 14, Article 52

[332] Supra note 14, Article 48

[333] France signed 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) on 11 April 2001 and ratified on 11 April 2001. See *Ibid*

[334] Supra note 313

[335] Supra note 14, Article 52 (1)

[336] Supra note 293

[337] Supra note 84

Forces on the ground in Libya throughout the period of international intervention[338], NATO forces did not extend their involvement to controlling the authority of the Libyan State. Should this have been the case however, then NATO forces such as the USA and France would be obligated to adhere to provisions of the Hague Regulations and Additional Protocol I dealing with the proper conduct of occupying forces regarding private property.

7.1.2.1 Hague Convention IV, Article 52

Article 52 of the Fourth Hague Convention provides that occupying forces may only requisition private property where it is required for the army of occupation. The Article further States that any such requisition shall be proportionate to the resources available, and should be compensated[339]. The types of property referred to by Article 52 includes fuel and gasoline[340], and so the protections granted by the Article may prove valuable to foreign investors in the oil industries of Libya or Syria should they be faced with an invasive and occupying foreign force as part of an international armed conflict. As a general rule, occupants cannot take private property for their own personal enrichment (such requisitioning or expropriation must only take place for military purposes), and shall not deprive private property from its owner without providing compensation[341].

7.1.2.2 Additional Protocol I, Article 58

Article 58 of Additional Protocol I compels occupying powers in an international armed conflict to remove civilian objects under their control from the vicinity of military objectives[342]. Occupying powers are also obliged under the Article to take precautions necessary to protect civilian objects under their control against dangers resulting from military operations. In rendering these protections however, occupying powers are not expected to organise their armed forces in such a manner as to make them obvious to their enemy[343]. The ICRC, in its commentary to Article 58, notes that immovable objects (such as oil and gas fields and facilities) cannot be removed from the vicinity of military objectives, and as such

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[338] Chris Stephen, 'Libya conflict: British and French soldiers help rebels prepare Sirte attack' (*The Guardian*, 26 August 2011) <http://www.theguardian.com/world/2011/aug/25/libya-conflict-british-french-soldiers-rebels-sirte> accessed 17 August 2015

[339] Supra note 309, Article 52

[340] Phillip C. Jessup, 'A Belligerent Occupant's Power over Property' [1944] 38 AJIL 457, p. 459

[341] *Ibid*, p. 458

[342] Supra note 14, Article 58

[343] Commentary to 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, para. 2246

must be rendered endangered[344]. The ICRC further notes that where civilian objects require special protection (including those containing dangerous forces, such as oil and gas facilities), then their damage must be mitigated via, for example, effective fire fighting[345]. In this sense, Article 58's protections tend to focus more on the protection of civilians by occupying powers, and towards mitigating the effects of any damage to civilian property towards human life. Foreign investors involved in host States in which an occupying power has authority would thus be advised to avoid any claims of liability based upon Article 58, and instead focus on provisions aimed at the protection of civilian objects from an economic or private property viewpoint.

7.2 Non-international armed conflict

The law of non-international armed conflict (LNIAC) forms a counterpoint to those protections and obligations regarding international armed conflict. The rights and obligations contained within the LNIAC allow for foreign investors in Libya and Syria to potentially render these host States and relevant non-State actors liable for damage to their investments during stages of non-international armed conflict. As noted in Chapter 7.1, these protections operate independently of those contained in BITs, and as such are useful for entities such as Shell, Gulfsands and Suncor, which are incorporated or based in States without an investment treaty relationship with either Libya or Syria. The rights, obligations and protections provided by the LNIAC will be relevant for foreign investors in Libya in its period of non-international armed conflict. As discussed in Chapter 3.1, non-international armed conflict in Libya is likely to have existed in the period prior to NATO intervention (February 20[346] until 17 March 2011[347]), and the period post NATO intervention; from October 31 2011[348] until present. Syria, in contrast (and as discussed in Chapter 3.2) has seen a constant non-international armed conflict, commencing in either July 2011[349], or March 2012[350].

[344] *Ibid*, para. 2250
[345] *Ibid*, para. 2258
[346] Supra note 24
[347] Supra note 27
[348] Supra note 30
[349] Supra note 40
[350] Supra note 43

7.2.1 Losses caused by host State

As per the ILC Articles on State Responsibility, States will be held responsible for actions of their organs[351]. State organs are outlined by the ILC to include "all the individual or collective entities which make up the organization of the State and act on its behalf"[352]. Thus, where these State entities are found to have breached obligations including Article 52 of Additional Protocol I[353], and Article 14 of Additional Protocol II[354], they will be held liable. Similarly, Libya and Syria will be held liable for breaches of these obligations undertaken via approved private action[355], a point particularly relevant for Libya, where (as discussed in Chapters 6.1.2.1.3 and 6.2.2.2.1) militia groups have been found to act as proxy armed forces of certain challenging government groups[356].

7.2.1.1 Additional Protocol I, Article 52

Libya and Syria may both be held liable under Article 52 of Additional Protocol I, as it exists in customary international law[357]. As noted in Chapter 7.1.2 however, Libya and Syria will only be held liable for attacking foreign investments held by the likes of Shell, Gulfsands and Suncor where it can be proven their investments are civilian, and not military objects. This seems unlikely, as in Libya and Syria oil and gas facilities have become a focal point of armed conflict. In Syria especially, those non-State actors which have controlled the flow and production of oil, for example ISIS, have seen benefits in the form of black-market revenue which they have allegedly put towards their combat effort against the Syrian government[358]. Thus, for example, were ISIS to successfully commandeer Gulfsands' Block 26[359], or Suncor's Ebla gas field[360], as they and other insurrectionist groups did to portions of Shell's former oil operations[361], these facilities will transform from civilian foreign investments into military objectives, whose destruction by Syria would provide a definite military advantage[362]. Thus, it is likely Syria will be justified in mounting a militarily necessary attack against these facilities. For this reason, it appears unlikely that foreign investors in Syria such

[351] Supra note 9, p. 44, Article 4
[352] Supra note 199
[353] Supra note 14, Article 52
[354] Supra note 16, Article 14
[355] Supra note 9, p. 45, Article 11
[356] Supra notes 34, 36
[357] Supra note 313
[358] Supra notes 116, 117, 118, 119, 120
[359] Supra note 103
[360] Supra note 105
[361] Supra note 116
[362] Supra note 14, Article 52 (2)

as Shell, Gulfsands and Suncor will benefit from Article 52's customary international law protection against Syrian actions.

7.2.1.2 Additional Protocol II, Article 14

Syria may also be held liable under Article 14 of Additional Protocol II, which prohibits the attack or destruction of objects indispensable to civilian survival, such as drinking water installations[363]. While Syria is not a State party to Additional Protocol II, its Article 14 is deemed by the ICRC to mirror a customary international law providing for the same prohibition[364]. Therefore, Syria may be held liable should its attack on the town of Kanaker[365] be found to have also involved the targeting of a water treatment facility developed by an unidentified German investor[366]. As discussed in Chapter 7.1.4.2 however, provisions such as Article 14 are geared towards the protection of civilian life, and are not focussed on the economic or private property aspect of a foreign investor's interest in an object such as a water treatment facility. For this reason, the unidentified German company would be advised to pursue any claims via the protections available in the Germany-Syria BIT[367].

7.2.2 Losses caused by Non-State actors and host State omissions

In addition to liability arising under the LNIAC for their own actions, Libya and Syria may also be liable for the actions of non-State actors against foreign investments throughout their respective non-international armed conflicts. As the ILC notes; internationally wrongful acts may consist of omissions by a State[368]. Thus, where Libya or Syria omits to undertake a particular action resulting in a breach of a LNIAC provision (such as those discussed above in Chapter 7.2.1), they will be held internationally responsible and may be required to compensate the affected parties, including foreign investors. Such liability is similar to that provided by BIT protection and security clauses, insofar as States which omit to act with due diligence in protecting and securing foreign investors are held responsible for resultant damages.

[363] Supra note 16, Article 14
[364] Supra note 313, Rule 54
[365] Supra note 124
[366] Supra note 106
[367] Supra note 141
[368] Supra note 9, p. 43, Article 2

7.2.2.1 Additional Protocol I, Article 52

In particular, Libya and Syria may be liable where they fail to prevent attacks against civilian objects by non-State actors which result in the violation of the prohibition contained in Article 52 of Additional Protocol I[369]. As discussed in Chapters 6.1.1 and 6.1.3, prevention in this sense should incorporate a duty to act with due diligence to the best of their capabilities as States in the midst of armed conflict[370], and to punish wrongdoers[371].

This protection is relevant for foreign investors in Libya and Syria who cannot access protection and security clauses contained within BITs, including Shell, Gulfsands and Suncor. While the investments of these entities (oil and gas facilities) arguably transform into military objects following their capture by non-State actors (as discussed in Chapter 7.2.1.1), it appears likely they will be categorised as civilian objects prior to such capture. This categorisation results from their use for civilian oil production; as such, they cannot be said to make an effective contribution to military action[372]. While portions of revenue and resources produced may have been diverted towards combat efforts by the Libyan and Syrian government (in the case of Syria, this is potentially evidenced by EU sanctions against its oil and gas industry[373]), the production was undertaken by civilian enterprises (including Shell, Gulfsands and Suncor as foreign investors) focussed on private profit. Therefore, a distinction may be made between the use of these foreign investments prior to capture by non-State actors, and their use post-capture, whereupon they were used almost exclusively for revenue and resource accumulation directed towards combat efforts[374]. For this reason, Article 52 of Additional Protocol I obliged Libya and Syria to act with due diligence, making full use of their capabilities, in protecting the civilian objects of Shell, Gulfsands and Suncor from attack and capture by non-State actors such as ISIS and the al Nusra Front[375].

As noted in Chapters 6.1.2.1.2 and 6.1.2.2 however, it is unlikely that foreign investors will be able to effectively argue that Libya and Syria failed to act with due diligence in protecting against the attack of their civilian objects. As a severely fractured State with multiple competing governments, it is possible that Libya simply does not have the capacity to prevent

[369] Supra note 14, Article 52
[370] Supra note 188
[371] Supra note 239
[372] Supra note 14, Article 52 (2)
[373] Supra note 108, 109
[374] Supra note 118
[375] Supra notes 96, 115, 116, 117

such attacks on civilian objects, despite its due diligence. Similarly, Syria currently exists as a fractured State, with certain areas no longer under government control. Within these uncontrolled areas, the Syrian State is arguably unable to prevent attacks by non-State actors against civilian objects, such as those formally operated by Shell, which by being predominately located within the Al Dei Zor region of Syria[376] existed within territory controlled by ISIS[377]. While Gulfsands' foreign investment in Syria (Block 26) is located in a relatively secure and allegedly government controlled area of Syria[378], were non-State actors to mount an attack against the civilian facility, then it is probable that Syria, despite its due diligence, would not have the resources and capability to prevent such an attack. This is perhaps reinforced by the circumstances in which the Shaer gas field, the location of portions of Suncor's investment in Syria[379], was quickly overtaken by ISIS forces on two separate occasions (in July[380] and November 2014[381]), despite multiple engagements and counter-attacks by Syrian armed forces.

Thus, foreign investments of the likes of Shell, Gulfsands and Suncor in Libya and Syria may qualify as civilian objects prior to their capture by non-State actors. However, the incapacity of the Libyan and Syrian States to prevent their attack by groups such as ISIS and the Al Nusra Front diminish the potential liability of Libya and Syria as per their obligations under Article 52 of Additional Protocol I, either as signatories, or as entities bound by customary international law.

7.2.2.2 Damages as a result of actions below the threshold of non-international armed conflict

States may be held liable where non-State groups damage potential foreign investments through force not meeting the threshold of armed conflict, such as riots, civil strife or other internal disturbances. Article 11 of the ILC's International Responsibility Second Report provides States may be liable in such situations where they are 'manifestly negligent' in taking measures normally taken to prevent and/or punish the damage or injury caused.

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[376] Supra note 118

[377] BBC News, 'Syria: Mapping the conflict' (*BBC News*, 10 July 2015) <http://www.bbc.com/news/world-middle-east-22798391> accessed 12 August 2015

[378] Supra note 103, *Ibid*

[379] Supra note 105

[380] Mariam Karouny & Larry King, 'Syria retakes Homs gas field from hardline group' (*Reuters*, 27 July 2014) <http://www.reuters.com/article/2014/07/27/us-syria-crisis-gasfield-idUSKBN0FW0HO20140727> accessed 12 August 2015

[381] Alexander Dziadosz & Janet Lawrence, 'Syrian government forces retake gas field from Islamic State: monitor' (*Reuters*, 6 November 2014) <http://ca.reuters.com/article/topNews/idCAKBN0IQ2EB20141106> accessed 12 August 2015

Therefore, where Libya is held to have not taken the required measures to prevent the commandeering of oil facilities by protestors or those participating in civil disturbances, it may be held liable. This protection is especially relevant for foreign investors such as, Eni, OMV and Repsol, who may have potentially received injury to their investments in Libya following the capture or ceased operation of certain oil and gas facilities resulting from civil disturbances[382].

7.3 Conclusion

The LIAC and the NLIAC provide valuable alternative protections to foreign investors who are not covered by the rights and obligations contained within Libyan and Syrian BITs. LIAC may be relevant for investors in Libya, including Eni and Shell, who aim to hold third party States (such as the USA and France) participating in attacks against Libyan territory liable for damages to their investments resulting from their attacks. NLIAC, while only available during periods of non-international armed conflict in Libya and Syria, may be valuable in the pursuit of claims against investment host States, and damages resulting from non-State actors. Where States are found to have violated an obligation contained in these provisions, they may, according to the ILC, be held internationally responsible[383] and thus rendered liable to provide compensation to the injured foreign investor[384].

Important protections under the LIAC focussed on enemy States attacking investment host States include those calling for the respect of private property[385], prohibiting the destruction of private property[386], and prohibiting attacks against civilian objects[387]. These protections are considered customary international law[388], and their violation may draw liability as war crimes under the Rome Statute of the ICC[389]. Liability under these provisions will only arise however where the foreign investments in question (particularly those of Eni and Shell in Brega, Libya) are found to be civilian and not military objects, and where an attack directed against them is not militarily necessary.

[382] Supra notes 97, 98
[383] Supra note 9, p. 43, Article 1
[384] Supra note 9, p. 52, Article 36
[385] Supra note 309, Article 46
[386] Supra note 311, Article 53
[387] Supra note 14, Articles 52 and 48
[388] Supra note 313
[389] Supra note 20

The LIAC also provides protections regarding the occupation by an enemy State of an investment host State. In particular, the Fourth Hague Convention prohibits the requisition of property by occupying forces unless such requisition is required for the occupying armed forces, and unless compensation is made payable[390]. Furthermore, Additional Protocol I obliges occupying powers to remove civilian objects under their control from the vicinity of military objectives[391], this protection is likely however to be more focussed on the protection of civilian life, as opposed to private property.

The LNIAC is important for foreign investors in Libya and Syria such as Shell, Gulfsands and Suncor, who as, Dutch, British and Canadian corporations, cannot benefit from a BIT with either Libya (in the case of Shell), or Syria (in the case of all three). Important LNIAC protections include the prohibition against attacks on civilian objects (Article 52, AP I), which, similarly to the protections provided by LIAC, will only prove applicable where the relevant foreign investments are found to be civilian objects, and the damaging attacks are not directed on grounds of military necessity. Additionally, the prohibition of destruction of objects indispensable to civilian survival (Article 14, AP II) may prove relevant for the unidentified German company investing in a water treatment facility in Kanaker, Syria. However, whether the prohibition is to be applied for the protection of private property, or is more focussed on protecting civilian life, is debateable.

Libya and Syria may also be liable under the LNIAC for the actions of non-State actors against foreign investments. Such liability is occasioned by the inaction of the respective States and is similar in operation to protection and security clauses contained in BITs, which call for States to act with due diligence in their protection of foreign investment. The prohibition of attacks against civilian objects once again constitutes a relevant obligation in this regard, with investments of the likes of Shell, Gulfsands and Suncor needing to be considered as civilian objects for it to apply. Libya and Syria may also be held liable for any omissions to act resulting in damage occasioned by civil disturbances, thus providing for an additional protection of foreign investments against measures of non-State actors which fall below the threshold of non-international armed conflict.

[390] Supra note 309, Article 52
[391] Supra note 14, Article 58

8. Exceptions to host State obligations and circumstances precluding wrongfulness

Investment host States, such as Libya and Syria, are not without defence should a foreign investor make a claim for State liability for damages resulting from their respective armed conflicts. Such defences are available specifically for BIT obligations via non-precluded measures (NPM) clauses, and are supplemented in customary international law by the concepts of force majeure and necessity.

8.1 Non-precluded measures clauses

8.1.1 Existence and application

NPM clauses limit the applicability of investment protection as provided under a BIT by allowing States to take actions inconsistent with the BIT's provisions. NPM clauses are common within multilateral investment treaties. Article 2102 of the NAFTA provides that nothing within the agreement (with exceptions) prevents a contracting party from taking actions it considers necessary for the protection of its essential security interests, especially those taken in taken in times of war or other emergencies in international relations[392]. Similarly, Article 24 of the ECT provides that the treaty's provisions (with exceptions) do not prevent contracting parties from taking measures they consider necessary for the protection of their essential security interests[393].

Despite this, NPM clauses are curiously not present in Libya's BITs with Austria[394], Italy[395], Spain[396] and Germany[397], or in Syria's with China[398], India[399] and Germany[400]. This is not to say however that Libya and Syria completely exclude their use. Article 3 (2) of the Belgium-Luxembourg and Libya BIT provides that: "Except for measures required to maintain public order [...] investments shall enjoy continuous protection and security [...]"[401]. Similarly,

[392] Supra note 5, Article 2102
[393] Supra note 6, Article 24
[394] Supra note 58
[395] Supra note 127
[396] Supra note 129
[397] Supra note 128
[398] Supra note 139
[399] Supra note 59
[400] Supra note 141
[401] Agreement Between The Belgo-Luxemburg Economic Union, on the one hand, And The Great Socialist People's Libyan Arab Jamahiriya, on the other hand, On The Reciprocal Promotion And Protection Of Investments (adopted 15 February 2004, entered into force 8 December 2007), Article 3 (2)

Article 11 of the Czech Republic-Syria BIT provides that: "The Agreement shall not preclude the application by either Contracting Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own security interests [...]"[402]. The operation of the NPM clause contained in the Belgium-Luxembourg-Libya BIT ensures that where Libya undertakes measures to maintain public order, then for as long as such measures continue in their operation, the substantive provisions of the BIT (and thus, the protections open to Belgian and Luxembourger investors in Libya) are excluded[403]. Similarly, where Syria performs actions necessary for public order, its international peace or security obligations, or the protection of its security interests, Czech investors will be barred from invoking the protections contained within the BIT, insofar as they conflict with Syrian actions[404].

8.1.2 Non-self-judging, or self-judging?

It is considered that the conditions for the application of security exceptions are easily met in circumstances of armed conflict. This will result in the NPM clauses of both Libyan and Syrian BITs entering operation, henceforth rendering Belgian, Luxembourger or Czech investments in either State unprotected by the relevant provisions of their respective BITs, should measures to maintain public order or to protect security interests be implemented by Libya or Syria.

The definitions of concepts within NPMs, particularly "maintenance of public order" and "protection of essential security interests", are withheld in both Belgian-Luxembourg-Libya and Czech Republic-Syria BITs. This is a common occurrence and is largely undertaken by States to allow for a flexible definition of the terms according to specific situations[405]. In light of this, NPM clauses may be interpreted either by the parties to the treaty, or by independent third parties such as arbitral tribunals. Arbitral jurisprudence has seemingly confirmed that most NPM clauses are to be considered non-self-judging, and thus concepts such as "maintenance of public order" and "protection of essential security interests" must be

[402] Agreement Between The Czech Republic And The Syrian Arab Republic On The Promotion And Reciprocal Protection Of Investments (adopted 21 November 2008, entered into force 14 July 2009), Article 11
[403] *CMS Gas Transmission Company v Argentina Republic,* Decision of the Ad Hoc Committee, ICSID Case No ARB/01/8, 25 September 2007, para. 146
[404] *Ibid*, para. 129
[405] United Nations Commission for Trade and Development, 'Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking (*United Nations*, 2007) <http://unctad.org/en/docs/iteiia20065_en.pdf> accessed 13 August 2015, p. 83

interpreted solely by entities independent of the contracting parties. According to jurisprudence, the non-self-judging nature of NPM clauses may be determined via similarities to NPM clauses contained in other instruments[406], through analysis of evidence highlighting an agreed interpretive method at the time of treaty signature[407, 408], and where the clause has not been expressly drafted as self-judging[409]. Therefore, for the NPM clauses in the Belgium-Luxembourg-Libya and Czech Republic-Syria BITs to be held as self-judging, the clauses must be determined by an arbitral tribunal to incorporate clear language of such an intention, lest Libya and Syria are able to escape from their legitimate obligations towards foreign investors contained within their respective BITs[410].

8.1.3 Relationship with the concept of necessity

The notion of necessity referred to in NPM clauses (see: "[...] measures necessary for the maintenance of [...]"[411]) should be considered distinct from the concept of necessity provided by the ILC Articles on State Responsibility, and which will be discussed further in Chapter 8.3.4.

NPM clauses operate so as to exempt the actions of States (regarding, for example, maintenance of public order, or protection of security interests) from becoming liable as per their BIT obligations. This is evidenced by the wording of NPM clauses, particularly the use of the term "shall not preclude", which operates to prevent the taking of certain actions from being rendered as violations of the relevant BIT's obligations. In contrast, the necessity standard espoused by the ILC Articles on State Responsibility presupposes the commission of an act not in conformity with a State's international obligations. However, due the act's characterisation as a 'necessary' act, no liability will arise for the relevant State[412].

The scope of NPM clauses and the concept of necessity within the ILC Articles on State Responsibility also differ. NPM clauses are contained within bilateral treaties, and therefore

[406] Supra note 258, para. 371
[407] Supra note 66, para. 212
[408] Supra note 257, para. 337
[409] *Sempra Energy International v Argentina Republic*, Award, ICSID Case No ARB/02/16, 28 September 2007, para. 379
[410] *Continental Casualty Company v Argentina Republic*, Award, ICSID Case No ARB/03/9, 5 September 2008, para. 187
[411] Supra note 402
[412] *Sempra Energy International v Republic of Argentina*, Annulment Proceeding, ICSID Case No ARB/02/16, 29 June 2010, para. 115

apply only between the contracting parties who have specifically agreed to its operation and application. In contrast, the State of necessity as incorporated within the ILC Articles on State Responsibility constitute customary international law[413], and as such, may be applied on a broader scale, with the possibility to "be invoked in any context against any international obligation"[414].

8.2 Circumstances precluding wrongfulness

8.2.1 Force majeure

Article 23 of the ILC Articles on State Responsibility provides that the wrongfulness of State actions not in conformity with an international obligation of that State is precluded where the act is undertaken due to force majeure. The Article determines that force majeure refers to 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"[415]. The Article further provides that the concept of force majeure will not apply where the irresistible force or unforseen event is due to the conduct of the State, or where the State has assumed the risk of the relevant situation occurring[416]. The commentary to Article 23 provides that force majeure may arise due to human intervention, particularly via "loss of control over a portion of the State's territory as a result of an insurrection or devastation of an area by military operations carried out by a third State"[417]. Arbitral jurisprudence supports this characterisation of force majeure. The *Spanish Zone of Morocco Claims* case held that a State cannot be held prima facie responsible for events including an uprising or international war, and subsequently, cannot be held liable for damages resulting from such events obtained within its territory[418]. Similarly, the tribunal in the *Sambiaggio Case (of a general nature)* held that as "Revolusionists (sic) are not the agents of government, [...] a natural responsibility does not exist [for the State]"[419], while in the *Affaire relative à la concession des phares de l'Empire ottoman* case (the *Lighthouses case*), the tribunal denied a French claim for restoration

[413] *Ibid*, para. 113
[414] Supra note 410, para. 167
[415] Supra note 9, p. 48, Article 23 (1)
[416] Supra note 9, p. 49, Article 23 (2)
[417] Supra note 199, p. 76, Article 23
[418] Supra note 239, p. 642
[419] *Sambiaggio Case (of a general nature) (Italy v Spain),* Award, 10 RIAA 499, 1903, p. 515

following the destruction of its property in Greece, as the destruction resulted from enemy action[420].

Circumstances constituting force majeure must, however, render the performance of a State's obligations materially impossible, and not merely 'difficult' or 'burdensome'[421]. This has been confirmed by domestic courts, including the United States District Court (Delaware) in *National Oil Co v Libyan Sun Oil*, which held force majeure could not be invoked by a USA company to excuse its obligations towards Libya, despite the USA government prohibiting USA passports from travel to Libya. The court in *National Oil Co* held such a circumstance did not constitute a materially impossible scenario, as there were alternative methods available for the company to perform its obligations, including the hiring of non-USA personnel[422].

8.2.1.1 Application to Libya

Should it be found to have violated its obligations contained either within its BITs with Austria, Italy, Germany and Spain or within the laws of armed conflict, Libya may claim force majeure to preclude its violating acts from a determination of wrongfulness, and hence international responsibility. For this to occur, the circumstances leading to Libya's claim of force majeure (most likely the existence of international and non-international armed conflicts within its territory) must have been an irresistible force or an unforeseeable event, and must have resulted in its obligations being materially impossible to perform.

8.2.1.1.1 Irresistible force or unforeseeable event

The non-international armed conflicts in Libya arguably constitute an irresistible force, thus fulfilling the opening requirement of a force majeure claim. As noted by the ILC, the term "irresistible force" refers to a constraint which the State is unable to oppose by its own means[423]. The two periods of non-international armed conflict in Libya (before and after international intervention) resulted in a circumstance which the Libyan government was unable to oppose. This appears self-evident in the first period of non-international armed conflict, with the inability of the Libyan government to oppose the insurrection leading to its

[420] *Affaire relative à la concession des phares de l'Empire ottoman,* Award, 12 RIAA 155, 24/27 July 1956, p. 198
[421] *Rainbow Warrior (New Zealand v France),* Award, 20 RIAA 217, 30 April 1990, para. 77
[422] *National Oil Co v Libyan Sun Oil* 733 F.Supp. 800 (1990)
[423] Supra note 199, p. 76, Article 23

defeat and the death of its leader[424]. The second period of non-international armed conflict, while less clear, must also be categorised as an irresistible force which the Libyan government is unable to oppose. This is evidenced by competing governments and militia movements, which the legitimate government (whether that be the Council of Deputies, the General National Congress, or otherwise) has been unable to oppose, insofar as each competing entity has captured and controlled significant Libyan territory[425].

The international armed conflict in Libya may be considered as unforeseen, thus additionally fulfilling a force majeure claim's opening requirement. As noted by the arbitral tribunal in *Autopista Concesionada De Venezuela, C.A v Bolivarian Republic of Venezuela* (*Autopista*), the existence of similar preceding circumstances may result in an event becoming foreseeable[426]. While international intervention had occurred against Libya in the preceding decades (predominately by the USA[427]), there had been improving relations between Libya and the international community in the years leading up to 2011[428]. Furthermore, the speed of the developments leading to the international armed conflict (non-international armed conflict began in February 2011[429], UNSC Resolution 1973 was passed on 17 March 2011[430], and NATO airstrikes began on or earlier than 19 March 2011[431]) suggests there was little to no opportunity for foresight by the Libyan government with regard to the arrival of an international armed conflict. Therefore, the international armed conflict Libya should constitute an unforeseeable event.

8.2.1.1.2 Impossibility of performance

The tribunal in *Autopista* provided the term "materially impossible in the circumstances to perform the obligation"[432] refers to circumstances in which, "[...] by all reasonable judgment

[424] BBC News, 'Libya's Col Muammar Gaddafi killed, says NTC' (*BBC News*, 20 October 2011) <http://www.bbc.com/news/world-africa-15389550> accessed 17 August 2015
[425] Supra notes, 34, 36, 37, 38
[426] *Autopista Concesionada De Venezuela, C.A v Bolivarian Republic of Venezuela*, Award, ICSID Case No ARB/00/5, 23 September 2003, para. 117
[427] The United States of America carried out 'Operation El Dorado Canyon', comprising of air strikes, against Libya in April 1986. See Bernard Weinraub, 'U.S. Jets Hit 'Terrorist Centers' in Libya; Reagan Warns of New Attacks If Needed' (*New York Times*, 15 April 1986) <http://www.nytimes.com/1986/04/15/politics/15REAG.html> accessed 15 August 2015
[428] BBC News, 'Libya profile – Timeline' (*BBC News*, 16 June 2015) <http://www.bbc.com/news/world-africa-13755445> accessed 14 August 2015
[429] Supra note 24
[430] Supra note 27
[431] Supra note 28
[432] Supra note 9, p. 48, Article 23 (1)

the event impedes the normal performance of the contract [or obligation]"[433]. The existence of armed conflict in Libya arguably fulfils this requirement. As discussed throughout this paper, armed conflict in Libya has resulted in a lack of territorial control by a central recognised government, and has left the Libyan State (including its population and resources) severely fractured. This has resulted in Libya being unable to perform obligations contained within its BITs (such as its protection and security obligations[434]), or within the law of armed conflict (including prohibitions against attacks on civilian objects[435]), particularly due to the fact it arguably does not hold the capacity to properly protect entities such as foreign investments and civilian objects.

8.2.1.1.3 Not due to the conduct of the State

As discussed in Chapter 6.1.2.1, the current Libyan government cannot be held liable for the actions of the successful insurrectionist movement, due to the lack of continuity between the two entities. Hypothetically however, should the requisite degree of continuity be held to exist between the current government and the insurrectionist movement; the current Libyan government will assume liability for the acts of the successful insurrectionists[436]. This would ensure that where Libya argues force majeure in defence of the actions of the pre-insurrectionist government, it will be characterised as a state which has contributed to the situation of force majeure, and will thus be unable to claim its defence as per Article 23 (2) (a)[437]. For example, in the case of damage caused by the previous Libyan government to Eni's investment in the Brega oil facility[438], the current Libyan government would be unable to claim that the actions of the insurrectionist movement resulted in a force majeure situation, as those actions are (as per Article 10 (2) of the ILC Articles[439]) to be considered their own. Conversely, the current Libyan government would not be able to defend the actions of the insurrectionist movement by reason that attacks by the pre-insurrectionist government constituted force majeure. This is because, under Article 10 (3) of the ILC Articles[440], the

[433] Supra note 426, para. 121
[434] Supra note 58, Article 3; Supra note 128, Article 4; Supra note 127, Article 2 (3); Supra note 129, Article 3 (1)
[435] Supra note 14, Article 52
[436] Supra note 9, p. 45, Article 10 (2)
[437] Supra note 9, p. 49, Article 23 (2) (a)
[438] Supra note 84
[439] Supra note 9, p. 45, Article 10 (2)
[440] Supra note 9, p. 45, Article 10 (3)

attacks will constitute acts of the current government, thus ruling them ineligible to constitute force majeure by the operation of Article 23 (2) (a)[441].

For this reason, where the current Libyan government is found to hold a sufficient continuity from the successful insurrectionist movement, force majeure cannot be invoked by Libya regarding acts undertaken by the insurrectionists or the pre-insurrectionist government. Only actions undertaken by ISIS, NATO, or other third parties would constitute an irresistible force or unforeseen event capable of reaching the force majeure requirements.

8.2.1.2 Application to Syria

Where Syria is found to have violated its obligations to foreign investors as per its BITs with China, India or Germany (as discussed in Chapters 6.1.2.2, 6.1.3.1, 6.2.1), or under the laws of armed conflict (as discussed in Chapters 7.2.1 and 7.2.2), it may claim force majeure to preclude its violating acts from a determination of wrongfulness, and hence international responsibility.

8.2.1.2.1 Irresistible force or unforeseen event

Similar to the circumstances in Libya, Syria's non-international armed conflict may be characterised as an irresistible force; a constraint which it is unable to oppose by its own means. This is seemingly confirmed by the success of a number of insurrectionist groups in Syria, which are fighting against the Syrian State. Syria has been unable to oppose the likes of the Al Nusra Front and ISIS from capturing and controlling large portions of Syrian territory[442]. That Syria is unable to oppose the actions of these insurrectionist groups by its own means is perhaps illustrated by the commencement of international air strikes against certain groups within Syrian territory[443], which was required to not only reduce their territorial control, but to also diminish their authority.

8.2.1.2.2 Impossibility to perform

It is arguable that by all reasonable judgment, the events of the non-international armed conflict in Syria have impeded the normal performance of Syria's obligations under its BITs and the laws of armed conflict. Syria may rightly contend that due to the irresistible force

[441] Supra note 9, p. 49, Article 23 (2) (a)
[442] Supra notes 116, 117, 118, 119, 120
[443] Supra note 121

which was the various insurrectionist movements directed against it, it was unable to perform its protection and security obligations towards foreign investors such as ONGC Videsh and Emerald Energy (as discussed in Chapters 6.1.2.2 and 6.1.3.1). In both cases, it may be found that Syria simply could not protect and secure the investments from their attack and capture by non-State actors[444] due to the nature of the non-international armed conflict, which has seen Syrian forces fighting on numerous fronts, losing large tracts of territory, and resulted in greatly dispersed combat and security resources[445].

Furthermore, due to the non-international armed conflict, Syria was arguably unable to perform its obligations under the LNIAC towards civilian objects controlled by Shell, Suncor, and (theoretically) Gulfsands. In particular, Syria's inability to perform its obligation under Additional Protocol I to prevent attacks against civilian objects by itself (as discussed in Chapter 7.2.1.1) and non-State actors (as discussed in Chapter 7.2.3.1)[446] may be precluded from wrongfulness by a claim of force majeure. In these instances, Syria may argue that due to the irresistible force of insurrectionist movements, particularly ISIS, it was impossible for them to not attack certain civilian objects (that is, those captured by ISIS), and that additionally, they did not hold the capacity to prevent attacks by ISIS against the civilian objects originally.

An exception to Syria's application of force majeure may be found in its attack against the town of Kanaker, and the possible damage obtained by the unidentified German company's investment in that town[447]. In this instance, there appears to be no support for a position of force majeure, with the potential violations of its protection and security obligations under the Germany-Syria BIT[448] (as discussed in Chapter 6.1.2.2) and its obligation to not attack objects indispensable for civilian life (as discussed in Chapter 7.2.1.2)[449] not the result of an irresistible force. The attack, having occurred in the very early stages of the armed conflict, was not occasioned by the same unpreventable forces which existed later in the conflict (including loss of territorial control and diminished protective capacity). Additionally, while the attack may have been based on a clear aim (the elimination of the insurrectionist movement), there appears to have been no reason as to why the Syrian government could not have adopted an alternative approach (such as the arrest of the suspects) so as to reduce the

[444] Supra note 119
[445] Supra note 377
[446] Supra note 9, Article 52
[447] Supra note 124
[448] Supra note 141, Article 4 (1)
[449] Supra note 16, Article 14

possibility of damage occurring to foreign investment and civilian objects, let alone civilian life.

It should also be noted that Syria may argue force majeure against any potential claims of lost profits or compensation by Shell resulting from its withdrawal from the State[450]. Syria may contend that it was unable to provide Shell with its profits or revenue during this period due to the imposition of EU sanctions[451], constituting an irresistible force which it is unlikely to be able to oppose by its own means. By restricting the financial relationships between EU corporations such as Shell and Syria, the sanctions ensured the impossibility of Syria performing its obligations towards Shell. That force majeure is available in this instance is seemingly confirmed through its invocation by Gulfsands in response to the EU sanctions[452]. These events are removed from the discussion of this paper however, and would be better analysed in light of contractual standards and obligations.

8.2.2 Necessity

Article 25 of the ILC Articles on State Responsibility provides that necessity may be invoked by a State to preclude the wrongfulness of an act not in conformity with an international obligation of that State[453]. Necessity may be only invoked however where the act "Is the only way for the State to safeguard an essential interest against a grave and imminent peril", and as long as the act "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"[454]. The Article imposes two further exceptions to an invocation of necessity, providing that it may not apply where "the international obligation in question excludes the possibility of invoking necessity", or where "the State has contributed to the situation of necessity"[455]. The ILC provides that a claim of necessity will arise where "[...] there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other"[456]. Claims of necessity must regard an imminent peril that possesses a degree of temporal proximity[457], additionally; the course of action taken by the State in response to the

[450] Supra note 110
[451] Supra note 109
[452] Supra note 103
[453] Supra note 9, p. 49, Article 25
[454] Supra note 9, p. 49, Article 25 (1)
[455] Supra note 9, p. 49, Article 25 (2)
[456] Supra note 199, p. 80, Article 25
[457] *Gabcikovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 67, para. 54

imminent peril must be the only available preventive method[458]. Similar to the approach taken regarding force majeure, tribunals have held that absent of an express provision to the contrary, necessity is not a self-judging concept, and as such, there must be minimal reliance on the host State's interpretation of a 'necessary' situation[459].

8.2.2.1 Application to Libya and Syria

8.2.2.1.1 Application against obligations under the law of armed conflict

Libya and Syria may be prevented from invoking necessity to preclude the wrongfulness of their actions which violate an obligation under the law of armed conflict. This is because necessity may not be invoked by Libya or Syria as a ground for precluding wrongfulness where the international obligation in question excludes the possibility of invoking necessity[460]. International obligations may exclude the possibility of invoking necessity where they refer to necessity in some, but not all, provisions. This is due to the assumption that the drafters of the international obligations intended necessity to be available regarding some provisions, but not all[461]. The laws of armed conflict are particularly relevant in this regard, with Additional Protocol I (Article 54 (5), Article 62 (1), Article 67 (4), Article 71 (3)), the Fourth Geneva Convention (Articles 108, 143, 147) and the Fourth Hague Convention (Regulations Article 54), all explicitly referencing necessity in some provisions, but not all. While Additional Protocol II does not explicitly refer to necessity, its obligations (as with those of many other humanitarian conventions) were arguably drafted so as to apply even in situations of "abnormal peril", and therefore, as contended by the ILC, there exists an implied intention to exclude the invocation of necessity[462].

8.2.2.1.2 Application against obligations under BITs

Where Libya and Syria are found to have breached their obligations under their respective BITs, they may invoke necessity to preclude their wrongfulness as a result of the breach. Breaches of their respective protection and security and war clause obligations (discussed in Chapters 6.1 and 6.2) may have their wrongfulness precluded where it is found that an

[458] Supra note 199, p. 83, Article 25
[459] *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales del Agua S.A. v The Argentine Republic*, Decision on Liability, ICSID Case No ARB/03/17, 30 July 2010, paras. 235-243; Supra note 258, para. 317; Supra note 66, paras. 207-214
[460] Supra note 9, p. 49, Article 25 (2) (a)
[461] Supra note 280, p. 56
[462] International Law Commission, *Report on the International Law Commission on the Work of Its Thirty-Second Session,* UN Doc A/35/10 (1980), p. 50-51

essential interest of Libya or Syria may only be protected from a grave and imminent peril by undertaking the breaching act. In the case of Libya or Syria, an essential interest may include each State's territorial integrity, governance, or civilian wellbeing, while the grave and imminent peril may exist in the form of non-State actors, militia movements and insurrectionists.

In particular, necessity may be invoked by Libya in response to liabilities arising under its 'extended' war clauses with Austria[463] and Spain[464], should it launch an attack against the El Sharara oil field (currently in the control of non-State actors[465]) which results in damages to OMV's or Repsol's potential investments in the field. In this instance, Libya may contend that it was necessary to attack the field and subsequently damage the investments in order to protect an essential interest in the form of its territorial unity or national security from a grave and imminent peril in the form of the non-State actors.

Similarly, Syria may invoke necessity in response to liabilities arising as per its protection and security obligations with India[466], should it mount an attack against the oil fields in which ONGC Videsh's investment was based[467]. Syria may argue that it was necessary for it to undertake the damaging actions so as to safeguard its national security or territorial integrity in the face of a grave or imminent peril in the form of non-State groups such as ISIS.

8.3 Conclusion

NPM clauses, such as those contained within the Belgium-Luxembourg-Libya[468] and Czech Republic-Syria[469] BITs, exclude the operation of BIT provisions where the investment host State undertakes certain measures, including maintenance of public order, restoration of international peace or security, or protection of security interests. NPM clauses have been ruled as non-self-judging, and as such their operative terms (for example; public order, maintenance or restoration of international peace and security, and protection of security interests) may only be determined by a third party, such as an arbitral tribunal[470]. As an

[463] Supra note 58, Article 5 (2)
[464] Supra note 129, Article 6 (2)
[465] Supra note 94
[466] Supra note 59, Article 3 (2)
[467] Supra note 119
[468] Supra note 401
[469] Supra note 402
[470] Supra note 66, para. 212; Supra note 257, para. 337; Supra note 258, para. 371; Supra note 409

instrument distinct from the concept of necessity, NPM clauses apply and act as law only between those contracting parties to the relevant treaty[471].

An investment host State may enact force majeure where an irresistible force or unforeseen event has made it materially impossible for the State to perform an obligation[472]. Material impossibility ensures the State's performance of its obligation must have been rendered more than merely difficult, with arbitral tribunals finding that where an alternative method of meeting the obligation is available, material impossibility cannot exist[473].

Where the current Libyan government is found to be a continuation of the successful insurrectionist movement, it will not be able to argue force majeure to preclude the wrongfulness of acts committed by the previous Libyan government or the successful insurrectionist forces. It may however be successful against acts undertaken by third parties including NATO and ISIS. This scenario is unlikely to develop however, thus providing Libya with greater flexibility in its potential use of force majeure.

Both Libya and Syria may implement force majeure insofar as they are unable to oppose non-State actors such as ISIS from controlling significant territory. In the case of Syria, this lack of control may result in protection and security obligations being impossible to perform towards foreign investors from India (ONGC Videsh) and China (Emerald Energy) as per the relevant BITs. Obligations under the LNIAC towards investors from the Netherlands (Shell), Canada (Suncor) and the UK (Gulfsands) may also be rendered impossible to perform. It appears unlikely however that Syria will be able to implement force majeure in precluding the wrongfulness of its actions in the town of Kanaker and the potential damage occasioned to the unidentified German company's water treatment facility in the town.

While force majeure is exercised where an investment host State is compelled by an independent force, necessity refers to a situation in which the State, in order to safeguard an essential interest, is necessitated to act in a manner which breaches an obligation. Many laws of armed conflict may be held to exclude the possibility of an invocation of necessity[474], and as such, necessity may only be exercised by Libya and Syria against obligations contained within their BITs.

[471] Supra notes 412, 410, para. 167
[472] Supra note 9, p. 48, Article 23 (1)
[473] Supra note 422
[474] Supra notes 124, 141, Article 4 (1)

9. Final conclusion

There exists a variety of available options for foreign investors to obtain protection for their investments in a host State beset by armed conflict. These protections are predominately focussed on the physical security of the investment; perhaps best illustrated by protection and security obligations and extended war clauses, and the protections provided by the laws of armed conflict prohibiting attacks on or destruction of civilian objects. Alternatively, a smaller amount of protections are focussed upon the supply of appropriate compensation for losses occasioned by armed conflict (non-discrimination war clauses), and for the requisitioning of civilian objects during an occupation of territory (Fourth Hague Convention, Article 52[475], and Additional Protocol I, Article 58[476]). These protections are located in a variety of legal instruments, the most prominent of which (at least in the case of Libya and Syria) appears to be BITs, with the law of armed conflict providing for alternative avenues of redress where a foreign investor does not benefit from a BIT with the investment host State (for example, Dutch, UK and Canadian incorporated investors which do not benefit from BITs with Libya or Syria). Auxiliary sources of protection include multilateral treaties such as NAFTA and the ECT, which for the purposes of this paper were generally overlooked in favour of legal instruments which more accurately reflected the legal devices open to foreign investors in Libya and Syria specifically. Investors are further aided by an array of liabilities which may arise for investment host States such as Libya and Syria. In particular, liabilities may arise for actions committed by not only the authorities currently in power, but also the actions of the successful insurrectionist movement forming the current authority (where sufficient continuity exists), and actions of the previous government.

9.1 Hindrances and restrictions to claimants

Despite the existence of these methods for foreign investors to protect their investments in Libya and Syria, their claims of liability may be hindered via safeguards which operate to ensure investment host States maintain their own rights. This is exemplified by the concepts of due diligence and military necessity, which act to alleviate liability where Libya or Syria are found to have acted to the best of their ability in protecting an investment, or in line with military requirements when directing an attack against an investment. Further safeguards may exist in a successful implementation of a force majeure or necessity defence precluding the wrongfulness of a State's actions. Specific safeguards also exist, for example the application

[475] Supra note 309, Article 52
[476] Supra note 14, Article 58

of extended war clauses is restricted thanks to a heavy burden of proof (developed through arbitral jurisprudence) placed upon investors claiming State liability for destruction of their assets. While certainly an impediment for foreign investors, these safeguards are valuable insofar as they protect the sovereignty of States such as Libya and Syria, and allow them a degree of flexibility regarding their policy decisions in times of national emergencies.

9.2 Options for arbitration and liability

For these reasons, foreign investors in Libya and Syria are on the whole likely to face substantial difficulties in mounting a successful arbitral liability claim in respect of damages obtained in the Libyan and Syrian armed conflicts. Claims relating to a State's omission to act should prove particularly problematic, with Libya and Syria both capable of arguing in favour of their own due diligence and insufficient capacity to protect foreign investment in light of reduced territorial control, diminished resources and divided authority. This will likely prove fatal to claims alleging a breach of Libya's or Syria's protection and security obligations, with the strength and relative power of non-State actors preventing a foreign investor such as Eni or ONGC Videsh from effectively evidencing a State's capability to protect their investment from such entities.

In addition, the difficulties obtaining conclusive evidence from areas damaged by armed conflict appears to condemn most claims made under an extended war clause to failure. Unfortunately for potential claimants such as OMV and Repsol, arbitral jurisprudence[477] highlights a large burden of proof which foreign investors must meet in showing that destruction or partial destruction of their investment has been occasioned by the actions of their host State. The difficulties in obtaining conclusive proof that a State's actions damaged a claimant's investment are perhaps exacerbated through the passing of time, with physical evidence possibly tarnished, removed or destroyed under the conditions of an armed conflict.

The most promising avenue for Libyan liability arising from its armed conflict may take the form of a protection and security claim by Italian investor Eni. The claim, regarding Eni's potential interests in the Brega oil facility, would be based upon the argument that Libyan armed forces failed to act with due diligence in extracting themselves from the vicinity of the foreign investment. This action, which resulted in the facility coming under fire from

[477] Supra note 189, para. 58

insurrectionist and NATO forces, in addition to the defensive actions of the Libyan forces themselves, may breach the protection and security obligations contained within the Libya-Italy BIT[478]. Allegations that Libyan authorities used the Brega facility as a weapons cache would appear to further support a claim developed by Eni.

In the case of Syria, the government attack on Kanaker, and the potential damage occasioned to the unidentified German investor's water treatment facility, stands as the most promising potential claim. Absent defences of force majeure or necessity due to its occurrence in the preliminary stages of the armed conflict, the claim may succeed by alleging a breach of Syria's protection and security obligations contained within its BIT with Germany[479], due to Syria failing to exercise restraint in its use of armed force. That an attack against the water treatment facility would likely breach Syria's obligations under Article 14 of Additional Protocol II (prohibiting attacks on objects indispensable for civilian life)[480], which is mirrored under customary international law[481], adds weight to a potential claim.

9.3 Minimal arbitral activity

Curiously, as of August 2015 there has been little arbitral activity regarding foreign investment in Libya and Syria during their respective armed conflicts. This may be attributed to a number of factors. Firstly, the armed conflicts in both States are still ongoing, and as such, arbitration procedures may prove difficult both from a logistical and financial perspective. Attached to this may be concerns regarding the inability of States such as Libya and Syria to provide compensation or damages ordered as a result of arbitration, given the financial downturn which has befallen both States throughout their respective armed conflicts[482].

Arbitration claims may also not be forthcoming due to the nature of the investments in Libya and Syria. The primary foreign investment sector in both States is the oil and gas industry, and despite the armed conflicts, the essential 'ingredient' for the industry (the raw oil and gas

[478] Supra note 127, Article 2 (3)
[479] Supra note 141, Article 4 (1)
[480] Supra note 16, Article 14
[481] Supra note 313, Rule 54
[482] P.J.W & L.P, 'Libya on the edge' (*The Economist*, 20 October 2014) <http://www.economist.com/blogs/graphicdetail/2014/10/daily-chart-12> accessed 16 August 2015; The World Bank, 'Syria: Overview' (*The World Bank*, 1 March 2015) <http://www.worldbank.org/en/State/syria/overview> accessed 16 August 2015

materials) has largely remained intact, despite infrastructure damage. This is evidenced by the continued production and shipping of oil and gas (punctuated with intermittent interruptions) from sources within Libya[483], and indeed Syria[484]. Given this, foreign investors in the oil and gas sector may prefer to 'wait out' the period of armed conflict (accepting the possible damages and reduced revenue), and aim to return to their investments following the conflict. Such a tactic depends on the development of commercial relations with the victorious entity, and as such, arbitration claims may be withheld to provide the best possible chance of reengaging with investments.

9.4 Future prospects

There appears to be no concrete evidence that a resolution to the armed conflicts in Libya or Syria will be found in the near future. Instead, both conflicts are developing an increasing complexity and ferocity. Regional powers such as the United Arab Emirates, Egypt[485] and Turkey[486] have publicly entered the conflicts, while others have done so with less fanfare, resulting in the construction of what may be a series of battlegrounds to decide regional dominance through the use of proxy forces and murky alliances. This is a worrying trend first and foremost for the populations of Libya and Syria, but also for their nations' economic health. Leaving aside debates over the benefits (or otherwise) of foreign investment in a State's natural resources; for a region with such natural wealth it is unfortunate that a robust investment climate with workable protections and guarantees for foreign investors cannot yet be reached.

[483] Armin Rosen, 'The industry behind the world's 9th-largest proven oil reserves has all but collapsed' (*Business Insider*, 18 February 2015) <http://www.businessinsider.com.au/libya-has-48-billion-barrels-of-oil-but-its-industry-has-almost-entirely-collapsed-2015-2> accessed 17 August 2015

[484] Supra note 120

[485] David D. Kirkpatrick & Eric Schmitt, 'Arab Nations Strike in Libya, Surprising U.S.' (*New York Times*, 25 August 2014) <http://www.nytimes.com/2014/08/26/world/africa/egypt-and-united-arab-emirates-said-to-have-secretly-carried-out-libya-airstrikes.html?_r=0> accessed 16 August 2015

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11. Abstract

Investment protection in armed conflict constitutes a valuable segment of international law and international arbitration. International investment protection law is a vital cog in the stimulation of foreign investment, with its rights and obligations acting as a carrot by enticing, protecting and allowing for the sustainable input of foreign funding and expertise into host state industry and economy. These protections are now more vital than ever, with the current international economic environment allowing corporations and individuals to invest and build commercial relationships with a variety of States, not just their own.

Accompanying the expansion of foreign investment however, has been a growth in international and non-international armed conflicts. Foreign investment has not avoided these conflicts, and as a result, the correct application of international investment protection law is required to ensure the safety of foreign investors and their investments, and to secure the benefits which these commercial relationships may bring.

This paper will analyse the extent to which international investment protection law can be applied to armed conflict scenarios. In an effort to determine the correct application and utilisation of these laws, the paper will analyse the armed conflicts of Libya and Syria as practical examples. These armed conflicts were chosen due to their contemporary nature and their active foreign investment sphere, with both States operating significant resource extraction industries with the help of foreign investment. Using available data from foreign investors in Libya and Syria, the paper will apply relevant treaties, jurisprudence and custom in an effort to identify those laws which are most applicable and beneficial, both from the perspective of foreign investors, and States.

The paper determines that the rights and obligations contained within treaties and custom may be applied to armed conflict in specific circumstances. However, the nature of the armed conflicts in Libya and Syria are such that an application beneficial for a foreign investor will prove difficult. Safeguards attached to the applicable rights and obligations prevent a straightforward activation of State liability for losses incurred by foreign investors as a result of armed conflict. In particular, the concepts of due diligence, military necessity and proportionality play an integral role, with the nature the Libyan and Syrian armed conflicts appearing conducive to the operation of these safeguards.

Given the complex nature of the Libyan and Syrian armed conflicts, it is not surprising that while applicable, international investment protection law does not automatically provide

beneficial results from an investor standpoint. Issues relating to burdens of proof, availability of evidence, State disorganisation and financial difficulties each play a role in diminishing the prospects of success for an investor seeking a claim of liability for losses obtained in armed conflict. In many cases, this has little to do with the operation of international investment protection law as a field, but more to do with the nature of the beast that is armed conflict, and the accompanying dangers and risks which may befall investors operating in its vicinity.

12.Zusammenfassung

Das internationaleInvestitionsschutzrechtist ein unerlässliches Zahnradzur Ankurbelung von Auslandsinvestitionen, deren Rechte und Pflichten sich wie eine Karotteverhalten, die Investitionen anlockt, schützt und den nachhaltigen Beitrag ausländischer Direktinvestitionen und Expertise für die Industrie und Wirtschaft des Gastgeberstaates gewährleistet. Angesichts des derzeitigen wirtschaftlichen Umfeldes, das sowohl Unternehmen als auch Individuen ermöglicht, zu investieren und dabei die wirtschaftlichen Beziehungen mit einer Vielfalt von Staaten aufzubauen, sind diese Schutzvorkehrungen heute von entscheidenderer Bedeutung als jemals zuvor.

Als Begleiterscheinung einer solchen Expansion ausländischer Investitionen ist ein Anwachsen internationaler und nicht-internationaler bewaffneter Konfliktezu erkennen. Ausländische Investitionen konnten solche Konflikte nicht vermeiden, sodass eine ordnungsgemäße Anwendung des internationalen Investitionsschutzrechts erforderlich ist, damit die Sicherheit für ausländische Investoren und ihre Investitionen gewährleistet wird, und der Nutzen, den diese wirtschaftlichen Beziehungen bringen soll, gesichert werden kann.

Diese Arbeit analysiert das Ausmaß, in dem internationale Investitionsschutzabkommen angesichts bewaffneter Konfliktszenarien angewandt werden können. Um die ordnungsgemäße Anwendung solcher Abkommen bestimmen zu können, behandelt die Arbeit die bewaffneten Konflikte in Libyen und Syrien als praktische Beispiele. Diese bewaffneten Konflikte wurden sowohl aufgrund ihrer Aktualität ausgewählt, als auch wegen der Tatsache, dass sich beide Staatenmit der Hilfe ausländischer Investitionen eines beträchtlichen Ressourcenverbrauchs bedienen. Mit den verfügbaren Daten ausländischer Investoren in Libyen und Syrienkonnte die vorliegende Arbeit relevante Abkommen undRechtsprechung sammeln, um jenes Gewohnheitsrecht identifizieren zu können, das aus der Perspektive sowohl des Investors, als auch des Staates am ehesten anwendbar und nützlich sein könnte.

Diese Arbeit hält fest, in wie weit die Rechte und Pflichten, die in den angeführten Abkommen und Usancen enthalten sind, unter bestimmten Umständen in bewaffneten Konflikten angewandt werden dürfen. Allerdings verhält es sich bei der Natur der bewaffneten Konflikte in Libyen und Syrien so, dass sich deren Anwendung nur schwer als für den Investor nützlich erweisen kann. Die Schutzmaßnahmen, die den anwendbaren Rechten und Pflichten beigefügt sind, verhindern ein geradliniges Inkraftsetzen einer Staatshaftung für jene Verluste ausländischer Investoren, die durch bewaffnete Konflikte

herbeigeführt worden sind. Vor allem Begriffe wie angemessene Sorgfalt, militärische Notwendigkeit und Proportionalität spielen eine wesentliche Rolle,wenn die Art der bewaffneten Konflikte in Libyen und Syrien sich dem Schutz von Einlagen als dienlich erweisen.

Angesichts der Tatsache, dass die bewaffneten Konflikte in Libyen und Syrien komplexer Natur sind, wird es niemanden überraschen, dass das internationale Investitionsrecht, obwohl anwendbar, nicht automatisch positive Resultate vom Standpunkt des Investors zu bieten hat. Aspekte wie die Last der Beweisführung, die Verfügbarkeit von Beweismaterial,staatliche Auflösung und finanzielle Schwierigkeiten tragen dazu bei, die Erfolgsaussichten für einen Investor, der Schadensersatzansprüche für Verluste durch bewaffnete Konflikte geltend machen möchte, zu schmälern. In vielen Fällen hat dies kaum mit dem Bereich des internationalenInvestitionsschutzrechtes als Fachgebiet zu tun, sondern viel mehr mit der Natur bewaffneter Konflikte samt ihren inherenten Gefahren und Risiken, die sich in unmittelbarer Nähe zu den Investitionenereignen können.